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# IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

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GERALD GOLDBERG, Executive Officer of the California Franchise Tax Board, *Petitioner,*

v.

JAMES ELLETT, *Respondent.*

E. LES SORENSON, Executive Director of the California State Board of Equalization, *Petitioner*

v.

and CARMINE ARTIGLIO, *Respondent*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This is a federal court action seeking to enjoin a state official from collecting lawfully imposed state taxes, based on the assertion that those taxes were discharged in a bankruptcy case in which neither the state taxing agency nor the state official voluntarily participated. The question presented is:

Is a federal bankruptcy court barred from hearing this action by the Tax Injunction Act where there is a "plain, speedy, and effective remedy" in state court, or by California's sovereign immunity from suit in federal court; or can the federal court rely on *Ex parte Young*, 209 U.S. 123 (1908) to allow it to adjudicate the application of the discharge injunction to the state tax debt?

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**IN THE SUPREME COURT OF THE UNITED STATES**

No.

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GERALD GOLDBERG, Executive Officer of the California Franchise Tax Board, , *Petitioner,*

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JAMES ELLETT, *Respondent.*

E. LES SORENSON, Executive Director of the California State Board of Equalization, *Petitioner*

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and CARMINE ARTIGLIO, *Respondent.*

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Petitioner, Gerald Goldberg, Executive Officer of the California Franchise Tax Board ("FTB"), respectfully prays that a writ of certiorari issue to review the opinion and judgment entered in favor of debtor, James Ellett, by the United States Court of Appeals for the Ninth Circuit on July 16, 2001, and modified by that court on August 27, 2001.

Petitioner, E. Les Sorenson, Executive Director of the California State Board of Equalization ("SBE"), respectfully prays that a writ of certiorari issue to review the Memorandum decision and judgment entered in favor of debtor Carmine Artiglio by the United States Court of Appeals for the Ninth Circuit on July 11, 2001.

Goldberg and Sorenson file this joint Petition pursuant to Supreme Court Rule 12, because the Ninth Circuit based its decision in *Artiglio* on its decision in *Ellett* and the questions for review in both cases are identical or closely related. Except as otherwise indicated, reference to Goldberg will include Sorenson, reference to Ellett will include Artiglio, and reference to the FTB will include the SBE.

## OPINIONS BELOW

*Ellett*. The opinion of the Ninth Circuit in the *Ellett* case is reported at 254 F.3d 1135 and is reprinted in the Appendix ("App."), *infra,* at 1a-30a. The opinion of the Ninth Circuit Bankruptcy Appellate Panel in ("BAP") is reported at 243 B.R. 741 and is reprinted in App., *infra,* at 31a-39a. The opinion of the bankruptcy court is reported at 229 B.R. 202 and is reprinted in App., *infra,* at 40a-54a.

*Artiglio*. The Memorandum decision of the Ninth Circuit in *Artiglio* is unreported and is reprinted in App., *infra,* at 55a-56a. The opinion of the BAP is unreported and is reprinted in App., *infra,* at 57a-63a. The ruling of the bankruptcy court is unreported and is reprinted in App., *infra,* at 64a-88a.

## STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgments denying petitioners' motions to dismiss and remanding the cases to the United States Bankruptcy Court, based on its conclusion that neither the Tax Injunction Act nor California's sovereign immunity from suit in federal court bar the suits against them. A suit denying a State's sovereign immunity is final for purposes of appeal. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.* 506 U.S. 139 (1993).

The judgment of the Ninth Circuit in *Ellett* was entered on July 16, 2001. A petition for rehearing was denied on August 27, 2001 (App. 4a-6a). The judgment of the Ninth Circuit in *Artiglio* was entered on July 11, 2001. A petition for rehearing was denied on August 23, 2001 (App. 89a-90a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Pursuant to Supreme Court Rule 29.4(b), petitioners state that 28 U.S.C. § 2403 (a) may apply in that the constitutionality of 11 U.S.C. §§ 106 (a) and 505 are drawn into question and neither the United States nor any federal department, office, agency, officer or employee is a party. The notification required by Rule 29.4 (b) has been made. The Ninth Circuit did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

## CONSTITUTION AND STATUTES INVOLVED

(Set forth verbatim in Appendix H *infra*.)

11 U.S.C. §§ 106 (a), 505, 507 (a)(2), 507 (a)(8), 523(a)(1), 524 (a), 541 (a), 1306 (a), & 1328 (a)
28 U.S.C. §§ 1334 (b) & 1341
Cal. Const. Art. XIII, § 32
Cal. Rev. & Tax. Code §§ 6933 & 19382

## STATEMENT OF THE CASE

For almost a century and a half, this Court has held that federal courts must decline to provide equitable relief in suits challenging the application of state tax laws when adequate state remedies exist. Congress ratified that understanding of federal-state relations when it enacted the Tax Injunction Act in 1937. The Ninth Circuit, however, has found an exception to this rule. Although neither the Tax Injunction Act nor the Bankruptcy Code mentions the other, the court read

a Bankruptcy Code exception into the Tax Injunction Act. The Ninth Circuit accordingly held that, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), it may enjoin a state official from collecting lawfully imposed state taxes, based on the assertion that those taxes were discharged in a bankruptcy case in which neither the state taxing agency nor the state official voluntarily participated. Review of that decision by this Court is warranted because the decision contravenes the express terms and manifest intent of the Tax Injunction Act and conflicts with this Court's decisions regarding *Ex parte Young* and States' sovereign immunity from suit in federal court.

### A. Background And Lower Court Proceedings In *Ellett*

In 1994 Ellett filed a Chapter 13 bankruptcy case. He scheduled the FTB as a general unsecured creditor for $18,000 of personal income taxes incurred between 1980 to 1990. The State did not file any claim in the case for the state taxes Ellett owed and did not otherwise participate. As a result, it neither sought nor received any distribution of assets from the bankruptcy estate. Ellett's plan was confirmed in April 1995, he was granted a discharge pursuant to 11 U.S.C. § 1328(a) in April 1997, and his case was thereafter closed.

Following the discharge, the State resumed its collection efforts. Ellett responded by re-opening his bankruptcy case and filing an adversary proceeding for injunctive and declaratory relief against Goldberg in his capacity as Executive Officer of the FTB. Goldberg moved to dismiss Ellett's adversary proceeding based upon California's sovereign immunity from suit in federal court. The bankruptcy court denied that motion (App. 54a), holding that Ellett's action was proper under *Ex parte Young*. The BAP affirmed (App. 39a).

### B. Background And Lower Court Proceedings In *Artiglio*

Artiglio filed his Chapter 7 bankruptcy case in 1998. He listed $245,000 in trust fund tax debts owed to the SBE based on sales taxes incurred by his business for the years 1991-1994. He notified the SBE of the case, but the SBE did not file a proof of claim or otherwise participate. After he was discharged and his case was closed, in March 1999 the SBE seized his income tax refund as part of its collection effort on his tax debt.

Artiglio also re-opened his bankruptcy case and filed an adversary proceeding seeking declaratory and injunctive relief against Sorenson, in his capacity as Executive Director of the SBE. When Sorenson and the SBE moved to dismiss, based upon the State's sovereign immunity, the bankruptcy court granted the motion, holding that California's courts provide an adequate forum in which to determine if the tax debt has been discharged. App. 66a-88a. The BAP reversed. App. 63a.

### C. The Court Of Appeals' Decision

The Ninth Circuit affirmed in *Ellett*, holding that a bankruptcy court may properly rely on the Supremacy Clause and *Ex parte Young* to exercise jurisdiction over a state tax official to determine whether a lawfully imposed state tax has been discharged in bankruptcy, and to prevent collection of that debt if so discharged. In so holding, the court concluded that the Bankruptcy Code served to impliedly repeal the Tax Injunction Act in bankruptcy proceedings. The Ninth Circuit reasoned that provisions of the Bankruptcy Code addressing pre-discharge issues provide bankruptcy courts with jurisdiction to resolve substantive state tax issues and provide for the classification of state tax obligations. App. 26a-29a (citing 11 U.S.C. §§ 505(a) and 507(a)(8)). Because it concluded that

resolving those issues might inevitably conflict with the mandate of the Tax Injunction Act to refrain from interference with state collection actions, it held that Congress must have intended to impliedly repeal the Tax Injunction Act *pro tanto,* even with respect to the post-discharge injunction. The court therefore found it unnecessary to decide whether the state court would provide a "plain, speedy, and efficient" forum where the issues involved in deciding the dischargeability of the State's particular tax claims could be resolved. App. 29a.

The Ninth Circuit also rejected Goldberg's contention that the *Ex parte Young* doctrine could not be invoked due to the limitations set forth in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). As to the former, the court ruled that the *Coeur d'Alene* "special sovereignty interests" exception does not apply to state tax collection. According to the court, whether the exception applies depends upon an assessment of "the *specific relief* requested by the plaintiff, not whether the relief merely *relates to* a more general area of core state sovereign interest." App. 19a (emphasis in original). Here, according to the Ninth Circuit, the specific relief requested "simply seeks prohibitory relief preventing" a state officer "from attempting to collect from Ellett specific pre-petition income tax obligations." App. 20a.

The Ninth Circuit then rejected Goldberg's contention that the Bankruptcy Code and the Tax Injunction Act constitute "detailed remedial schemes" that preclude *Ex parte Young* relief under *Seminole*. The court reasoned that the Bankruptcy Code's remedial scheme does not limit debtors' remedies in enforcing their rights and that (as noted above) the Tax Injunction Act does not apply in bankruptcy proceedings.[1/]

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1. On the merits of Ellett's claim, the Ninth Circuit held that a State is bound by a bankruptcy court's discharge order, even though

The Ninth Circuit affirmed the BAP's decision in *Artiglio,* based upon its opinion in *Ellett.* App. 56a. The court modified its original decision in *Ellett* on August 27, 2001, and then denied further reconsideration of its decision.

## REASONS FOR GRANTING THE WRIT

In its decision below, the Ninth Circuit held that, despite the requirements of the Tax Injunction Act, a federal bankruptcy court may properly exercise jurisdiction under *Ex parte Young* over a state tax official to enforce a bankruptcy discharge order issued in a case in which neither the official nor the State took any actions that waived the State's immunity from suit. The Constitution and Congress deny bankruptcy courts such power.

The holding below is contrary to Congress' "hostility," as expressed in the Tax Injunction Act, to using the *Ex parte Young* "fiction" to enjoin collection of state taxes;

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the State agency did not file a proof of claim, or otherwise voluntarily subject itself to the bankruptcy court's jurisdiction (App. 14a.), erroneously reasoning that it was a "threshold question" in resolving whether it had jurisdiction under *Ex parte Young.* App.9a.The court also held, however, that the issue of "whether Ellett's . . . taxes were dischargeable" should be decided on remand. App.14a fn 5. Because the Tax Injunction Act and California's sovereign immunity prevent the bankruptcy court from exercising jurisdiction, the Ninth Circuit acted improperly in considering the merits of the discharge application to the FTB as a "threshold issue." See, *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 778-779 (2000), *citing, Steel Co., etc. v. Citizens for a Better Environment,* 523 U.S. 83, 93-102 (1998); *Seminole,* 517 U.S. at 55-57. Petitioners contend that, like all other issues that are properly left for resolution before the state court, the question of whether the State's tax debts can be discharged at all is reserved for that forum.

ignores Congress' granting of concurrent jurisdiction to state courts to hear discharge claims involving state taxes; and violates this Court's sovereign immunity jurisprudence. The Ninth Circuit's decision also created a conflict with the Tenth Circuit on an important question concerning state sovereign immunity. Review by this Court is necessary to ensure that Congress' will is not flouted and that the States' sovereign immunity is not wrongly disregarded.

## I.

## THE NINTH CIRCUIT IMPROPERLY CREATED A BANKRUPTCY EXCEPTION TO THE TAX INJUNCTION ACT

The Tax Injunction Act, 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Congress enacted the statute in 1937 in response to federal courts' perceived abuses of the judicially-created *Ex parte Young* doctrine as a means to enjoin state tax collection. *Roswell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 n.28 (1981). The Act embodies Congress' agreement with this Court's "'scrupulous regard for the rightful independence of state governments,'" *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981) (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932), and its belief that the federal "courts should adopt a hands-off approach with respect to state tax administration" where there is an adequate remedy at law. *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995).

By its terms, the Tax Injunction Act is equally applicable to suits against a state officer as against the State itself. Its focus is on the prohibited effect—interfering with the

collection of taxes—not on the party on whom the suit operates to create that effect. Thus, *Ex parte Young* is not an exception to the Tax Injunction Act; it is the very reason the Act was enacted. Indeed, many of the cases holding that federal courts lack authority to enjoin state tax collections, such as *Mathews,* postdate the *Young* decision. Thus, assuming, *arguendo*, that the bankruptcy discharge – an injunction imposed pursuant to Congress' Article I authority – is valid, the Tax Injunction Act should still be held to bar the use of *Ex parte Young* suits against state officials which attempt to apply that statutory bar to particular state debts.

Consistent with that restrained view of federal power, the Bankruptcy Code only provides *concurrent* jurisdiction to bankruptcy courts to decide tax discharge questions. 28 U.S.C. § 1334(b); 11 U.S.C. §523(a)(1); *In re Franklin,* 179 B.R. 913, 919-923 (Bk. E.D. Cal. 1995). State courts retain full and equal power to hear and adjudicate all tax discharge issues. Indeed, it was not until 1970 that bankruptcy courts routinely heard any discharge issues. Prior to that time, all such issues were normally heard only in state court as defenses to collection actions. Although bankruptcy courts were then given exclusive power over a few discharge exceptions so that they could "develop" an expertise in those matters (*Brown v. Felsen*, 442 U.S. 127, 136 (1979)), the tax exceptions were not part of those new powers given to bankruptcy courts. Thus, it remains the case that state courts retain the power to apply and enforce the discharge provisions of the Bankruptcy Code to tax claims, to resolve all issues attendant thereto, and to provide the remedy set forth therein to debtors.

The Ninth Circuit held, however, that the Tax Injunction Act "is incompatible with the Bankruptcy Code's detailed scheme governing the dischargeability of tax debts" (App. 29a) and therefore *sub silentio* repealed it to that extent. By so holding, the Ninth Circuit has violated the "basic

principle of statutory construction" that one federal law should not be read to amend another unless they are "in irreconcilable conflict." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-154 (1976). See also, *Ashton v. Cory*, 780 F. 2d 816, 821-823 (9th Cir. 1986). Here, the two statutes can easily both be given a place, simply by requiring that adjudication of tax discharge issues be left to state courts, where they provide the necessary "plain, speedy, and efficient remedy."

The Ninth Circuit view that there is an irreconcilable conflict between the Tax Injunction Act and the Bankruptcy Code was not based on a demonstrated conflict between the Act and the discharge provisions. Instead, the court inferred a general, albeit unstated, congressional intention to override the Tax Injunction Act from its perception of conflicts between the Tax Injunction Act and two *other* sections of the Bankruptcy Code—Section 505, which allows federal courts to independently redetermine the merits of state tax law issues; and Section 507, which deals with the priority afforded state taxes. A closer examination, however, shows that the court's inference was unwarranted.

To begin with, neither provision explicitly states nor even suggests that a bankruptcy court is authorized (notwithstanding the Tax Injunction Act) to enjoin a state agency or officer from collecting a state tax. Section 507 priorities, for instance, do relate to whether certain taxes are dischargeable, but state courts have concurrent jurisdiction to resolve such issues as part of the determination of whether the debtor has presented a valid defense to a state law collection suits.[2/] 28 U.S.C. §1334 (b). Hence, application of the Tax

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2. The determination of priority turns in most instances on state law issues, such as when was a tax return due, when was it filed, when were taxes actually assessed and the like. See, *Schatz v. Franchise Tax Board*, 69 Cal. App. 4th 595, 81 Cal. Rptr. 2d 719

Injunction Act is perfectly consistent with application of Section 507—only where a State consents to the bankruptcy court's jurisdiction by filing a claim so that the court may resolve the validity, amount, and priority of that claim (and therefore its dischargeability, see *Gardner v. New Jersey*, 329 U.S. 565 (1947)), must those issues be resolved in bankruptcy court. In all other circumstances, those issues can simply remain before the state courts.

While there is a closer issue with respect to Section 505 (at least assuming that issuing a declaratory judgment about the legality of states taxes violates the Tax Injunction Act), there is still no basis to assume a broad congressional mandate to ignore the Tax Injunction Act in bankruptcy. To begin with, Section 505 is likely unconstitutional to the extent that it authorizes federal courts to litigate suits brought by a private party against an unconsenting State.[3/] If Section 505 is not constitutional as applied directly to the unconsenting States, this leaves only the possibility of filing an action against a state official under the *Ex parte Young* doctrine. However, such an action (which would also be subject to the Tax Injunction Act) cannot be brought under *Ex parte Young* when it would be based on application of state law. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). In addition, by its terms, section 505 cannot be used where there

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(1999).

3. Section 106(a) was enacted precisely because of the ongoing dispute over whether a federal court could determine taxes owed to a government that had not filed a claim in the case. *United States v. Nordic Village*, 503 U.S. 30, 34 (1992). After *Seminole*, that section has been held to be unconstitutional. *In re Mitchell*, 209 F.3d 1111, 1121 (9th Cir. 2000); *In re Sacred Heart Hosp.*, 133 F.3d 237, 241-45 (3d Cir. 1998); *In re Fernandez*, 123 F.3d 241, 243-45 (5th Cir. 1997), *as modified*, 130 F.3d 1138 (5th Cir. 1997); *In re Creative Goldsmiths*, 119 F.3d 1140, 1145-47 (4th Cir. 1997).

has already been a determination on the merits by the State, or where a refund has not been properly sought under state law. Finally, section 505 only provides that a bankruptcy court *may* "determine the amount or legality of any tax." This is entirely consistent with the common situation in which a State voluntarily participates in a bankruptcy case, and where procedural hurdles prevent a state-law remedy from being "plain, speedy and efficient."

To leap to the conclusion that Congress intended impliedly to repeal the Tax Injunction Act with respect to discharges, where there is no potential conflict at all, and where Congress plainly left state courts with the power to make these determinations, is a clear violation of the principle that conflicts between federal laws should be avoided, not sought out and created. In short, neither Section 505 nor Section 507 compels the conclusion that Congress, *sub silentio*, impliedly intended a partial repeal of the Tax Injunction Act when it enacted the Bankruptcy Code.

Rather, the proper axiom is: "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Alden v. Maine*, 527 U.S. 706, 732 (1999). Because there is a "plain, speedy and efficient" remedy in California's courts for Ellett's discharge claim, Ellett's adversary proceeding must be brought there rather than in bankruptcy court.[4] Certiorari should be granted to

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4. Article XIII, §32 of the California Constitution provides that a taxpayer must pre-pay a properly assessed tax before California's courts will be open to hear the taxpayer's dispute. This Court has upheld that remedy as "plain, speedy and efficient" under the Tax Injunction Act. *Franchise Tax Bd. v. Alcan Aluminium*, 493 U.S. 331, 338 (1990). Goldberg is unaware of any California appellate authority directly addressing whether Article XIII, §32 applies to a

enforce Congress' jurisdictional mandate in the Tax Injunction Act, and to protect the States from a judicially-created and unwarranted bankruptcy exception to the Act.

## II.

## THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S LIMITATIONS ON THE USE OF *EX PARTE YOUNG*

While conceding that the Bankruptcy Code's attempted broad abrogation of State sovereign immunity in bankruptcy court in 11 U.S.C. § 106(a) is unconstitutional, App. 10a (citing *In re Mitchell*, 209 F.2d 1111, 1121 (9th Cir. 2000)), the Ninth Circuit held that it could rely on the *Ex Parte Young* "fiction" to allow a private party to charge the state official with violating federal law (the discharge injunction) by collecting taxes that had allegedly been discharged in bankruptcy. In *Seminole Tribe*, however, this Court held that the *Ex parte Young* "fiction" could *not* be used to subject a state officer to a suit for prospective injunctive or declaratory relief if Congress had legislated a "detailed remedial scheme" with which that "fiction" would interfere. 517 U.S. at 74. Subsequently, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), this Court further held that the *Ex parte Young* "fiction" could not be used to sue a state officer in federal court for prospective injunctive relief when a State's "special sovereign interests" are

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discharge complaint under federal bankruptcy law. But see, *Schatz v. Franchise Tax Bd.*, 69 Cal. App. 4th 595, 81 Cal. Rptr. 2d 719 (1999) (tax issue relating to bankruptcy discharge adjudicated without prepayment of tax). In any event, those issues would properly be resolved in a state court action brought by Ellett, or could be addressed (if necessary, by certification to the California Supreme Court) by the Ninth Circuit on remand.

at stake. 521 U.S. at 281. The Ninth Circuit's use of *Ex parte Young* in tax discharge cases contravenes both of those principles.

### A. The *Coeur d'Alene* Limitation

Even before Congress enacted the Tax Injunction Act, this Court had "uniformly concluded that federal courts cannot enjoin collection of state taxes when a remedy at law is available." *National Private Truck Council, Inc.*, 515 U.S. at 589 (citing cases). Underlying those decisions was the fundamental importance of tax collection to state sovereignty. As later expressed by the Court: the "power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Service*, 520 U.S. 821, 826 (1997). Thus, this Court has already established— and Congress, through the Tax Injunction Act has expressed its assent— that the States' interest in the assessment and collection of taxes are sovereignty interests of such magnitude that federal injunctive relief is presumptively barred. *A fortiori* challenges to state tax collection fit in the same category as the challenge to State title to submerged lands at issue in *Coeur d'Alene*—both are such "special sovereignty interests" that *Ex parte Young* actions may not be maintained.

The importance to States of collecting the life blood of taxes was emphasized by Alexander Hamilton in the *Federalist Papers*:

> "Yet I am willing here to allow in its full extent the justness of the reasoning, which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . I affirm that (with the sole exception of duties on imports and exports) [the States] would

> under the plan of the Convention retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of this Constitution." *The Federalist Papers,* No.32 at 80 (Roy P. Fairfield ed. 1966).

While acknowledging the "profound nature" of the State's interest in tax collection, and that its ruling offends state sovereignty (App.19a), the Ninth Circuit concluded that Ellett's claim "necessarily presents less offense to state sovereignty" than those at issue in *Coeur d'Alene* because "Ellett simply seeks prohibitory relief preventing Goldberg from violating the bankruptcy court's discharge injunction." App. 19a-20a. This analysis, however, ignores the fact that the direct intrusion on state sovereignty sanctioned by the Ninth Circuit implicates *all* bankruptcy cases where California taxes are at issue (and, by extension, all bankruptcy cases where any State's taxes are at issue). The sovereign interest in a small dollar amount of tax is just as "special" as in a larger one because even a small case can have significant precedential implications. See *Butler Bros. v. Colgan*, 315 U.S. 501 (1942) (small tax dispute resolved major unitary tax issue); *Charles Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) ($46.14 tax dispute resolved Tenth Amendment challenge to federal unemployment insurance program).

The Ninth Circuit's holding that the *Coeur d'Alene* exception does not apply to actions seeking to enjoin state collection of taxes also conflicts with the decision of the Tenth Circuit in *ANR Pipeline, Inc. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998). In that case, in which a company challenged the State of Kansas' assessment provisions for property taxes, the

Tenth Circuit held that a State's interest in tax administration is a "special sovereign interest" that precludes the use of the *Ex parte Young* "fiction." 150 F.3d at 1193-1194. Citing this Court's opinion in *Coeur d'Alene*, the Tenth Circuit stated:

> We do not doubt, therefore, that a State's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership of land (*citing Coeur d'Alene*), it is impossible to imagine that a state government could continue to exist without the power to tax. *Id.* at 1193.

That court also found that the same principles of federalism and comity that underlie the Tax Injunction Act also compel the conclusion that the States' interest in the collection of their constitutionally assessed taxes "lie at the core of [their] sovereignty." *Id.*

The Ninth Circuit disagrees, and instead held that application of the *Coeur d'Alene* exception "requires an assessment of the intrusion on state sovereignty of the *specific relief* requested by the plaintiff, not whether the relief merely *relates to* a more general area of core state sovereign interest." App. 19a (emphasis in original).

The Ninth Circuit determined that, because "Ellett simply seeks prohibitory relief preventing Goldberg from violating the bankruptcy court's discharge injunction . . .," *Coeur d'Alene* does not apply. App. 20a. However, as this Court noted in *Coeur d'Alene*: "Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive

reliance on an obvious fiction." 521 U.S. at 270. Thus, by avoiding complete analyses of the Tax Injunction Act and *Coeur d'Alene's* "special sovereign interest" exception to *Ex parte Young* (which the Tenth Circuit undertook), the Ninth Circuit "reflexive[ly] rel[ied] on [that] obvious fiction."

Here, the Tax Injunction Act, Bankruptcy Code, California's sovereign immunity from suit in federal court and "proper . . . respect for state courts" require that Ellett's lawsuit seeking to determine the dischargeability of his state tax debt be heard in state court.

### B. The *Seminole* Limitation

In *Seminole Tribe,* this Court held that *Ex parte Young* could not be used to provide relief that exceeds the scope of what Congress has provided in a detailed remedial scheme of liability. 517 U.S. at 75 n.17. The Tax Injunction Act is just the sort of alternative "detailed remedial scheme" with which the *Ex parte Young* "fiction" will interfere. It limits the forums in which such claims may be made to state courts where they provide an adequate remedy. Whereas *Ex parte Young* relief would explicitly use the full remedial powers of the federal courts to enjoin collection of state taxes by means of a suit against a state official, the Tax Injunction Act explicitly bars the use of federal courts to enter an order that would have such an effect. It is hard to conceive of a more direct conflict between the limits of the statutory scheme and the free-wheeling authority provided to federal courts by the *Young* doctrine.

In this case, the Court need not *infer* that Congress intended to preclude broad *Ex parte Young* relief where a state remedy existed,[5] because Congress made its intentions crystal

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5. See *Seminole,* 517 U.S. at 75-76 and *Coeur d'Alene,* 512 U.S. at 274 (opinion of Kennedy, J.); *id.* at 293-294 (opinion of O'Connor, J.).

clear in the Tax Injunction Act. The Ninth Circuit failed to address this issue, because it held that the Tax Injunction Act did not apply in bankruptcy proceedings. Since, as shown above, this conclusion is plainly in error, the Ninth Circuit further erred in failing to recognize and apply the *Seminole* limitation.

Certiorari is needed to resolve the conflict with the Tenth Circuit, to provide guidance to the lower federal courts, and to ensure that bankruptcy is not treated as an exception to this Court's sovereign immunity jurisprudence.

## CONCLUSION

Ignoring Congress' and this Court's pronouncements on the adjudication of state tax claims in federal court, the Ninth Circuit used the discharge provisions of the Bankruptcy Code and the Supremacy Clause to circumvent what this Court has described as "a hands-off approach with respect to state tax administration." *National Private Truck Council*, 515 U.S. at 586. Although States have a strong interest in participating in bankruptcy estates in order to protect their sovereign fiscal interests, the Tax

Injunction Act and States' sovereign immunity from suit prevent bankruptcy courts from assuming jurisdiction in cases like this, where the State has chosen not to do so.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 19, 2001

Respectfully submitted,

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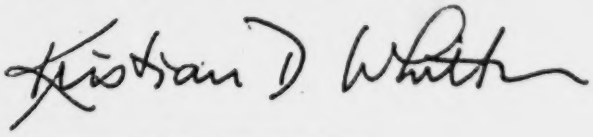

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# APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| In re: JAMES ELLETT<br><br>Debtor. | No. 00-15128<br><br>BAP No. |
| GERALD GOLDBERG,<br>Executive Director of the<br>Franchise Tax Board,<br>Appellant,<br>v.<br><br>JAMES ELLETT,<br>Appellee. | EC-99-001122-RBMa<br><br>ORDER AND<br>AMENDED<br>OPINION |

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Russell, Brandt, and Marlar, Bankruptcy Judges, Presiding

Argued and Submitted
May 16, 2001 — San Francisco, California

Filed July 16, 2001
Amended August 27, 2001

Before: Diarmuid F. O'Scannlain, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges

Opinion by Judge O'Scannlain

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## SUMMARY

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### Bankruptcy/Tax

The court of appeals affirmed a judgment of the Bankruptcy Appellate Panel (BAP). The court held that a bankruptcy court's discharge order is binding on a state, despite the state's election not to share in the recovery of the bankruptcy estate's assets by filing a proof of claim for past-due personal income taxes.

Appellee James Ellett petitioned for bankruptcy under Chapter 13 of the Bankruptcy Code. He scheduled the Franchise Tax Board of California (FTB) as a general unsecured creditor for non-priority personal income tax obligations. He notified the FTB of the commencement of the bankruptcy case, but the FTB did not file a proof of claim or otherwise participate in the bankruptcy proceeding. Because the FTB did not file a proof of claim, it received no distributions under the plan. The bankruptcy court discharged Ellett's obligations.

Several months later, the FTB sent Ellett a demand for payment of personal income taxes, stating that the obligations were not discharged in bankruptcy and that collection efforts would imminently commence against him. Ellett sued the FTB in bankruptcy court, seeking prospective injunctive and declaratory relief against appellant Gerald Goldberg in his capacity as the Executive Director of the FTB. Ellett contended that Goldberg's threatened collection of his prepetition state income tax obligations violated federal bankruptcy law. The bankruptcy court denied Goldberg's motion to dismiss for lack

of jurisdiction based on state sovereign immunity. The BAP affirmed.

Goldberg appealed.

[1] A suit seeking prospective equitable relief against a state official who has engaged in a continuing violation of federal law is not deemed to be a suit against the state for purposes of state sovereign immunity.

[2] The federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, it must submit to appropriate requirements by the controlling power. [3] That a bankruptcy court's order discharging a state tax obligation would effectively prevent the State from collecting monies otherwise due to it is not sufficient to transform the underlying bankruptcy case itself into a suit against a creditor state for Eleventh Amendment purposes. A bankruptcy court's discharge order is binding on a state, despite the state's election not to share in the recovery of the bankruptcy estate's assets by filing a proof of claim.

[4] The Tax Injunction Act (the Act) provides that district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state. [5] The Act does not abridge the power specifically granted to the bankruptcy court to make such judgments as may be necessary for the enforcement of the provisions of the Bankruptcy Act. [6] The Bankruptcy Code grants bankruptcy courts the power to enjoin the collection of certain state tax obligations. [7] Ellett's income tax obligations were properly discharged upon the completion of his Chapter 13 plan. Thus, Goldberg was already enjoined, by the discharge injunction itself, from collecting, recovering, or offsetting the tax as a personal liability of Ellett.

[8] The additional injunctive relief Ellett requested against Goldberg was no more than a device to compel Goldberg's compliance with the existing discharge injunction. Because Goldberg was already properly enjoined from collecting the disputed taxes, such additional injunctive relief did not run afoul of the Act. [91 The Act did not compel Ellett to pursue his action in state court or preclude a bankruptcy court from issuing injunctive relief.

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## COUNSEL

Kristian D. Whitten, Deputy Attorney General, San Francisco, California, for the defendant-appellant.

Robert N. Kolb, Antioch, California, for the plaintiff-appellee.

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## ORDER

The opinion filed July 16, 2001, is hereby amended as follows:

Slip Op. at 9033, line 2: Add the following new paragraph preceding the paragraph beginning, "Relying, in part, on Irving Trust":

> "According to Goldberg, *Irving Trust* merely stands for the proposition that a State must comply with a bankruptcy court's orders only if it wishes to invoke the jurisdiction of the bankruptcy court and receive its share of the debtor's assets *through the federal bankruptcy proceeding itself.* That is, Goldberg would interpret *Irving Trust* to permit a State to bypass the federal

bankruptcy proceeding altogether and yet still "participate in the assets of a bankrupt." But this interpretation directly conflicts with the Court's actual holding in *Irving Trust*: Goldberg conveniently ignores *Irving Trust's* pronouncement that, for a State to share in the assets of a bankrupt, "she must submit to appropriate requirements by the controlling [federal] power." *Id.*"

Slip Op. at 9034, line 22: Following the citation "*Id.* at 822," insert a new footnote that reads:

"Goldberg suggests that the Court expanded the definition of the term "suit" for purposes of state sovereign immunity in *Alden v. Maine*, 527 U.S. 706 (1999), and hence that Walker and In re Collins are no longer good law. Alden, however, held that the 11th Amendment bars Congress from subjecting non-consenting States to suit in state as well as federal court. Id. at 712. The definition of "suit" was not at issue in Alden, for the simple reason that Congress unquestionably subjected States to private suits for damages in state court under the Federal Labor Standards Act, regardless of whether one adopts an expansive or narrow understanding of the term "suit." Thus, Alden does not undermine the reasoning of Walker or *In re Collins*."

Slip Op. at 9035: Replace the third sentence of footnote 4 with the following:

"Thus, as this case returns to bankruptcy court for proceedings on the merits, the bankruptcy court must determine whether Ellett's pre-petition state income taxes were dischargeable."

With these amendments, the panel has voted unanimously to deny the Appellant's Petition for Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge has requested a vote on whether to rehear the matter en banc. The Petition for Rehearing En Banc is thus DENIED. Fed. R. App. P. 35.

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## OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a bankruptcy court may enjoin a state tax official from collecting state taxes purportedly discharged in a bankruptcy proceeding in which the State declined to participate.

### I

Gerald Goldberg, Executive Director of the Franchise Tax Board of California ("FTB"), appeals from a judgment of the Bankruptcy Appellate Panel ("BAP") affirming the bankruptcy court's denial of Goldberg's motion to dismiss an adversary proceeding brought by debtor James Ellett. Ellett seeks declaratory and injunctive relief barring Goldberg from collecting certain pre-petition state income tax obligations that were allegedly discharged in his bankruptcy proceeding.

In 1994, Ellett petitioned for bankruptcy under Chapter 13 of the Bankruptcy Code (the "Code"). He scheduled the FTB as a general unsecured creditor in the amount of $18,000 for non-priority personal income tax obligations for certain years between 1980-1990. He notified the FTB of the commencement of the bankruptcy case, but the FTB did not file a proof of claim or otherwise participate in the bankruptcy proceeding. Ellett's

Chapter 13 plan was confirmed in April 1995 and was completed two years later. Because the FTB did not file a proof of claim, it received no distributions under the plan. On April 19, 1997, the bankruptcy court discharged Ellett pursuant to 11 U.S.C. 1328(a).

Several months later, the FTB sent Ellett a demand for payment in the amount of $21,908.52 for personal income taxes for the years 1981, 1983, 1984, 1985, and 1990. The FTB notice stated that such obligations were not discharged in bankruptcy and that collection action was "now pending" and could involve attaching and withholding Ellett's wages, filing a lien on Ellett's real or personal property, or seizing Ellett's personal property. Counsel for Ellett notified the FTB of Ellett's Chapter 13 plan and discharge order, but the FTB again responded that his California income tax obligations had not been discharged and that collection efforts would imminently commence against him. Ellett thereupon filed the present adversary proceeding in bankruptcy court, seeking prospective injunctive and declaratory relief against Gerald Goldberg in his capacity as the Executive Director of the FTB.

Goldberg moved to dismiss for lack of jurisdiction based on state sovereign immunity. The bankruptcy court denied Goldberg's motion, holding that Ellett's action was proper under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The BAP affirmed in a published opinion, explaining that Ellett's suit "fits within the classic definition of Young." *Ellett v. Goldberg*, 243 B.R. 741, 744 (9th Cir. BAP 1999). This timely interlocutory appeal followed.[1]

## II

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1. We have jurisdiction over this interlocutory appeal under the collateral order rule. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (denial of motion to dismiss based on sovereign immunity is immediately appealable collateral order).

[1] Under *Ex Parte Young* and its progeny, a suit seeking prospective equitable relief against a state official who has engaged in a continuing violation of federal law is not deemed to be a suit against the State for purposes of state sovereign immunity. *Ex Parte Young*, 209 U.S. at 159-160; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (stating that "official-capacity actions for prospective relief are not treated as actions against the State."). Since the State cannot authorize its officers to violate federal law, such officers are "stripped of [their] official or representative character and [are] subjected in [their] person to the consequences of [their] individual conduct." *Ex Parte Young*, 209 U.S. at 160. *Ex Parte Young* relief is available to remedy continuing violations of federal statutory as well as constitutional law. *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1184 (9th Cir. 1997).

The Court has recognized that the *Ex Parte Young* doctrine is based upon the "fiction" that a state officer who violates federal law in his official capacity, pursuant to his authority under state law, is nonetheless not a state agent for sovereign immunity purposes. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269-70 (1997). The Court has embraced this fiction to vindicate the supremacy of federal law. As then-Justice Rehn quist stated for the majority in *Green v. Mansour*, "the avail ability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause," as "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. 64, 68 (1985).

**A**

To be entitled to relief under *Ex Parte Young*, then, Ellett must allege that Goldberg, in his official capacity as Executive Director of the FTB, is engaging in a course of activity in violation of federal law. Ellett contends that Goldberg's threatened collection of his pre-petition state income tax

obligations violates federal bankruptcy law. In his complaint, Ellett alleges that he was indebted to the FTB for non-priority state income taxes; that he duly scheduled the FTB as a general unsecured creditor in his Chapter 13 filings; that the FTB was notified of such claims but elected not to file a proof of claim and hence did not receive distributions under Ellett's Chapter 13 plan; and that the FTB's claims were thus properly discharged upon completion of his plan. Because a bankruptcy court's discharge order issued pursuant to 11 U.S.C. § 1328(a) "operates as an injunction against the commencement or continuation of an action" by creditors "to collect, recover or offset ... such [discharged] debt as a personal liability" of debtors, 11 U.S.C. § 524(a)(2), Ellett contends that Goldberg's attempt to collect his pre-petition state income tax obligations contravenes the bankruptcy court's § 524 discharge injunction.

The FTB did not, however, file a proof of claim in Ellett's bankruptcy proceeding or otherwise consent to the bankruptcy court's jurisdiction.[2] Thus, Goldberg's collection of Ellett's state income tax obligations could only violate federal law if the § 524 discharge injunction is binding on the State notwithstanding the State's election not to participate in the bankruptcy proceeding. Accordingly, the threshold question in this case is whether a State that does not consent to a bankruptcy court's jurisdiction by filing a proof of claim or otherwise participating in the bankruptcy proceeding is nonetheless bound by the bankruptcy court's § 524 discharge injunction.

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2. In Gardner v. New Jersey, 329 U.S. 565, 574 (1947), the Court held that a State waives its sovereign immunity by filing a proof of claim in a bankruptcy proceeding, stating that "[w]hen the State becomes the actor and files a claim against the fund it waives any immunity which it other wise might have had respecting the adjudication of the claim." The Court reaffirmed Gardner in CoIL Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 681 n.3 (1999).

**B**

Section 106(a)(1) purports to abrogate States' sovereign immunity with respect to various sections of the Bankruptcy Code, including § 524. In *In re Mitchell*, 209 F.3d 1111 (9th Cir.2000), however, we concluded that § 106(a) is unconstitutional to the extent that it authorizes the filing of adversary complaints against non-consenting States as named parties. We held that an adversary proceeding filed against the FTB to determine the dischargeability of taxes owed to the State was a "suit" for purposes of the Eleventh Amendment and hence constitutionally impermissible. 209 F.3d at 1116-17. We considered several factors to reach this conclusion: The debtors' adversary complaint invoked the court's exercise of in personam jurisdiction over the State; a summons was issued against the State compelling its response to the complaint; and "a decision in favor of the [debtors] would effectively prevent the State from collecting monies otherwise due to it . . . ." *Id.* at 1117.

Here, in contrast, no adversary proceeding has been initiated against the State as a named party. The question before us today, then, is whether the "bankruptcy case, in and of itself, constitutes an unconsented suit against a creditor state, so that the debtor's discharge, which operates as an injunction against collection of the debt . . . is ineffectual against the state under the Eleventh Amendment." *Texas v. Walker*, 142 F.3d 813, 821 (5th Cir. 1998).

[2] The Supreme Court resolved this issue long ago in *New York v. Irving Trust Co.*, 288 U.S. 329 (1933). In *Irving Trust*, the Court upheld a district court order barring a tax claim brought by the State of New York because the State failed to file a timely proof of claim. The State argued that the court's bar order was "incompatible with State sovereignty." 288 U.S. at 330. The Court rejected this argument, holding that

> [t]he Federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

*Id.* at 333.[3]

According to Goldberg, *Irving Trust* merely stands for the proposition that a State must comply with a bankruptcy court's orders only if it wishes to invoke the jurisdiction of the bankruptcy court and receive its share of the debtor's assets through the federal bankruptcy proceeding itself. That is, Goldberg would interpret *Irving Trust* to permit a State to by pass the federal bankruptcy proceeding altogether and yet still "participate in the assets of a bankrupt." But this interpretation directly conflicts with the Court's actual holding in *Irving Trust*: Goldberg conveniently ignores *Irving Trust's* pronouncement that, for a State to share in the assets of a bankrupt, "she must submit to appropriate requirements by the controlling [federal] power." *Id.*

Relying, in part, on *Irving Trust*, both the Fourth and Fifth Circuits have reaffirmed that a bankruptcy discharge injunction is binding on non-consenting States notwithstanding the Court's more recent sovereign immunity jurisprudence. *In re Collins*, 173 F.3d 924, 928-31 (4th Cir. 1999); Walker, 142 F.3d at 822-23. In *In re Collins*, the Fourth Circuit held that the Commonwealth of Virginia was not subjected to "suit" for

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3. More recently, in dicta, the Court construed former § 106(c) of the Bankruptcy Code to provide that "a State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes, but would not be subjected to monetary recovery." *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 102 (1989).

Eleventh Amendment purposes when the bankruptcy court reopened bankruptcy proceedings pursuant to 11 U.S.C. § 350 and determined that the Commonwealth's pre-petition judgment against the debtor for forfeited bail bonds, which the debtor had duly scheduled in his Chapter 7 case and for which the Commonwealth had failed to file a proof of claim, had been discharged by the court's Chapter 7 discharge order. 173 F.3d at 929-31. The Fourth Circuit explained that, unlike an adversary proceeding, a motion to reopen a bankruptcy case does not require service of compulsory process "because the bankruptcy court's power to reopen flows from its jurisdiction over debtors and their estates." Id. at 929. Hence, while the Commonwealth was notified of the motion, it was "not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court." Id. The court proceeded to explain that:

> [i]t has long been held that when a state is a creditor, bankruptcy procedure for proof and allowance of claims does not operate as a suit against the state in violation of the Eleventh Amendment. Nothing compels the state to submit to the jurisdiction of the federal bankruptcy court, and the court's power to allow or deny a state's claim derives from the court's jurisdiction over the bankruptcy estate. In short, if a state wishes to share in the estate, it must submit to federal jurisdiction.

*Id.* at 930 (citing *Irving Trust*, 288 U.S. at 333). Thus, the court affirmed the bankruptcy court's order determining that the bankrupt's debt to the Commonwealth had been properly discharged. *Id.*

Similarly, in *Texas v. Walker*, the Fifth Circuit concluded that the bankrupt's debt to the State had been discharged, not withstanding the fact that the State did not file a proof of claim for such debt in the bankruptcy case. Recognizing that the State's legal rights were adjudicated and altered by the

discharge, the court nevertheless held that the State was not thereby subjected to "suit" in violation of the Eleventh Amendment. 142 F.3d at 821-22. The court explained that, where the State is a creditor, "bankruptcy law modifies the state's collection rights with respect to its claims against the debtor, but it also affords the state an opportunity to share in the collective recovery. Bankruptcy operates by virtue of the Supremacy Clause and without forcing the state to submit to suit in federal court." *Id.* at 822.[4] Ct. *Gwilliam v. United States*, 519 F.2d 407, 412 (9th Cir. 1975) (bankruptcy court possessed jurisdiction, under section 17(c) of former Bankruptcy Act, to determine dischargeability of debtor's tax debts to the United States, notwithstanding government's failure to file proof of claim).

[3] To be sure, a bankruptcy court's order discharging a state tax obligation "would effectively prevent the State from collecting monies otherwise due to it. . . ." *In re Mitchell*, 209 F.3d at 1117. But under *Irving Trust*, this is not sufficient to transform the underlying bankruptcy case itself into a "suit" against a creditor State for Eleventh Amendment purposes. As the Fourth Circuit explained in *In re Collins*, the bankruptcy court exercises jurisdiction over the res of the bankruptcy estate when it issues its discharge order, not in personam jurisdiction over the estate's creditors. *Cf. California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998) (holding that Eleventh Amendment does not apply to bar federal court

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4. Goldberg suggests that the Court expanded the definition of the term "suit" for purposes of state sovereign immunity in *Alden v. Maine*, 527 U.S. 706 (1999), and hence that *Walker* and *In re Collins* are no longer good law. Alden, however, held that the 11th Amendment bars Congress from subjecting non-consenting States to suit in state as well as federal court. *Id.* at 712. The definition of "suit" was not at issue in *Alden*, for the simple reason that Congress unquestionably subjected States to private suits for damages in state court under the Federal Labor Standards Act, regardless of whether one adopts an expansive or narrow understanding of the term "suit." Thus, *Alden* does not undermine the reasoning of *Walker* or *In re Collins*.

jurisdiction over *in rem* admiralty actions where State claims an interest in, but does not actually possess, the *res* in dispute). Thus, we hold that a bankruptcy court's discharge order is binding on a State, despite the State's election not to share in the recovery of the bankruptcy estate's assets by filing a proof of claim.[5]

## III

While we conclude that a bankruptcy discharge order is binding on States notwithstanding their election not to consent to the bankruptcy court's jurisdiction, a discharge order clearly cannot be *enforced* against non-consenting States in an adversary proceeding where the State or a state agency is a named defendant. *In re Mitchell*, 209 F.3d 1111. The question with which we are presented here is whether a discharge order can be enforced against a state tax official in an action for prospective injunctive and declaratory relief under the *Ex Parte Young* doctrine. Goldberg maintains that the present action against him is barred as falling within one of the exceptions to *Ex Parte Young* that the Supreme Court has recently articulated in *Coeur d'Alene* and *Seminole Tribe v. Florida,* 517 U.S. 44 (1996).

### A

In *Coeur d'Alene*, the Coeur d'Alene Tribe claimed title to certain submerged lands within the original boundaries of its reservation and brought suit for declaratory and injunctive relief against various state officials. 521 U.S. at 264-65. The

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5. Of course, a debtor's particular state tax obligations may fall within an exception to discharge. See, e.g., 11 U.S.C. § 523(a)(1) (excepting from discharge in Chapter 7 and Chapter 11 cases priority tax claims as defined by 11 U.S.C. § 507(c)(8)). Thus, as this case returns to bankruptcy court for proceedings on the merits, the bankruptcy court must determine whether Ellett's pre-petition state income taxes were dischargeable. *Cf. Walker*, 142 F.3d at 821 (remanding for determination of whether debtor's obligations to the State were excepted from discharge pursuant to 11 U.S.C. § 523(a)(6)).

Tribe sought a declaration "of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands," and sought to enjoin the state officials from "regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands" under federal law. *Id.* at 265. The officials claimed immunity from suit under the Eleventh Amendment and a divided Court agreed. A majority of the Court concluded that the *Ex Parte Young* exception did not apply, explaining that "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action [against a State] which implicates special sovereignty interests." *Id.* at 281. In rejecting the Tribe's *Young* action, the Court emphasized the "far-reaching and invasive relief' sought by the Tribe:

> The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

*Id.* at 282.

In an opinion joined only by the Chief Justice, Justice Kennedy proposed a substantial recharacterization of the *Ex*

*Parte Young* doctrine which would require a "case-by-case analysis" of a number of concerns, such as the- availability of a state forum to hear the dispute, a "careful balancing" of the federal right at issue against the state's sovereignty interests, and consideration of whether "special factors counse[l] hesitation" in the exercise of jurisdiction.

Justice O'Connor, joined by Justices Scalia and Thomas, rejected Justice Kennedy's "case-by-case" approach to *Ex Parte Young* actions, stating that his approach "unnecessarily recharacterizes and narrows much of our Young jurisprudence." Id. at 291 (O'Connor, J., concurring in part). Justice O'Connor concluded that, under the Court's precedents, an *Ex Parte Young* action is generally available "where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id.* at 294. Nevertheless, Justice O'Connor agreed that *Ex Parte Young* relief was foreclosed in *Coeur d'Alene*, on its unique facts, because the Tribe's action was the "functional equivalent" of a quiet title action against the state that sought to "eliminate altogether the State's regulatory power over the submerged lands at issue- to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all." *Id.* at 289 (O'Connor, J., concurring in part). Justice O'Connor observed that the Court has "repeatedly emphasized the importance of submerged lands to state sovereignty." *Id.* In dissent, Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, expressed "great satisfaction" that Justice O'Connor's view on *Ex Parte Young*, not Justice Kennedy's, "is the controlling one." *Id.* at 298 (Souter, J., dissenting).

1

Goldberg asserts that a bankruptcy court order enjoining him from collecting state income taxes would intrude on California's "special sovereignty interests" in a manner analogous to the sweeping relief requested by the Coeur

d'Alene Tribe:

We recently considered *Coeur d'Alene* in the context of an *Ex Parte Young* challenge to state tax collection in *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000). In *Agua Caliente*, a tribe sought to enjoin California tax officials from imposing a sales and use tax on certain purchases at a tribal resort on reservation land. Id. at 1043. The state officials contended that the tribe's action threatened the State's "sovereign authority to tax" and, for this reason, was barred by the Eleventh Amendment under *Coeur d'Alene*. *Id.* at 1046. We rejected the state officials' Eleventh Amendment defense, explaining *Coeur d'Alene* as follows:

In *Coeur d'Alene*, it was the unique divestiture of the state's broad range of controls over its own lands that made the Young exception to sovereign immunity inapplicable. Thus, in the case on appeal here, characterizing the state's interest in taxation as a core sovereignty area does not address the question posed by *Coeur d'Alene*. Indeed, the question posed by *Coeur d'Alene* is not whether a suit implicates a core area of sovereignty, but rather whether the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself. To interpret *Coeur d'Alene* differently would be to open a Pandora's Box as to the relative importance of various state powers or areas of state regulatory authority. The majority did not countenance such a result. Applying this under standing of *Coeur d'Alene* to our case, it is clear that state taxation of tribes presents a very different circumstance from the situation in *Coeur d'Alene*....

> [W]e conclude that the Tribe's requested relief would not affect California's sovereignty interests to such 'a degree fully as intrusive as almost any conceivable retroactive levy upon

> funds in its Treasury', but would only ensure that the state sales and use tax be applied by state officials in a manner consistent with federal law. Any effect the Tribe's requested relief would have on the state's tax collection activities does not rise to the level of the interference with state sovereignty that existed in *Coeur d'Alene*.

*Id.* at 1048-49 (internal citations omitted).

*Agua Caliente* controls Goldberg's sovereign immunity challenge under *Coeur d'Alene*. Because Ellett's requested relief "would only ensure that the state [income] tax be applied by state officials in a manner consistent with federal [bankruptcy] law," its effect "on the state's tax collection activities does not rise to the level of the interference with state sovereignty that existed in *Coeur d'Alene*." *Id.* at 1049. To be sure, in *Agua Caliente*, we also relied on the "competing sovereignty interests" involved in the state's taxation of tribes, id. at 1048, but we expressly noted that "[the determination of whether the *Young* exception applies does not call for a balancing of one sovereign interest vis-a-vis another sovereign interest," *id.*

Goldberg relies heavily on the Tenth Circuit's opinion in *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178 (10th Cir.1998), in which the court held that the *Coeur d'Alene* exception *did* preclude an *Ex Parte Young* challenge to a state taxation scheme. The plaintiffs, operators of gas pipelines, challenged the State's valuation, assessment and taxation of their personal property on Equal Protection grounds. They requested the federal district court "to declare that [Division of Property Valuation officials] should recertify to Counties for subject and future tax years lawful values which comply with state and federal constitutions." *Id.* at 1185. The Tenth Circuit concluded that this amounted to a request "to rewrite Kansas' property tax

code with respect to its application against the personal property" of the pipelines and hence constituted "a major intrusion into Kansas' special sovereignty interests" in violation of the Eleventh Amendment. *Id.* at 1194.

*ANR Pipeline* is distinguishable from the present case. Ellett has not requested the bankruptcy court effectively to "rewrite [California's] [income] tax code." *Id.* Unlike the sweeping and intrusive relief sought in *ANR Pipeline*, which would have imposed *affirmative* obligations on the State, Ellett seeks relief of a merely *prohibitory* nature, which necessarily presents less offense to state sovereignty. Also unlike the plaintiffs in *ANR Pipeline Co.*, Ellett does not challenge the lawfulness of California's income tax code, nor does he question the State's authority to assess the income taxes in the first instance. Instead, he merely seeks to prohibit Goldberg from violating federal bankruptcy law by collecting the pre-petition taxes at issue as if they were continuing obligations owed to the State notwithstanding the bankruptcy court's discharge order.

In support of his position that an injunction bar-ring collection of the disputed income taxes would intrude upon California's special sovereignty interests in violation of the Eleventh Amendment, Goldberg recites various authorities attesting to the States' sovereign interest in the administration of their tax systems. *See, e.g.*, *McCulloch v. Maryland*, 4 Wheat. 316, 425 (1819); *The Federalist* Nos. 32, 33. We well recognize the profound nature of this interest, but we believe that Goldberg seeks to frame the issue before us at too broad a level of generality. As both *Agua Caliente* and *ANR Pipeline Co.* illustrate, application of the narrow exception to *Ex Parte Young* carved out by *Coeur d'Alene* requires an assessment of the intrusion on state sovereignty of the *specific relief* requested by the plaintiff, not whether the relief merely *relates to* a more general area of core state sovereign interest. The relief requested by the Tribe in *Coeur d'Alene* would have "extinguish[ed] the

State's control over a vast reach of lands and waters," 521 U.S. at 282; the specific relief at issue in *ANR Pipeline Co.* would have required the State to "rewrite [its] property tax code," 150 F.3d at 1194. In contrast, and analogous to the tribe's action in *Agua Caliente*, Ellett simply seeks prohibitory relief preventing Goldberg from violating the bankruptcy court's discharge injunction by attempting to collect from Ellett specific pre-petition income tax obligations duly discharged in bankruptcy under federal law.

2

A conceptually distinct, but related, issue raised by Goldberg is that *Ex Parte Young* relief is foreclosed here because the State is the real party in interest, given that an injunction barring the collection of Ellett's disputed taxes would operate against the State's treasury. This proves too much. The Court has repeatedly observed that prospective relief awarded pursuant to *Ex Parte Young* may have a substantial ancillary effect on a State's treasury, see *Edelman v. Jordan*, 415 U.S. 651, 667 (1974), but has nevertheless consistently held that this fact alone is insufficient to convert such actions into actions against the State for state sovereign immunity purposes, *see, e.g.*, *Milliken v. Bradley*, 433 U.S. 267 (1977) (school desegregation plan requiring substantial expenditure of state funds constituted prospective remedy and hence was not barred by state sovereign immunity). Indeed, in *Ex Parte Young* itself, the federal injunction barred the State's Attorney General from collecting substantial monetary penalties against railroads. 209 U.S. at 127. The critical distinction is whether the plaintiff requests prospective or retroactive relief.[6] Here, Ellett clearly

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6. To be sure, we noted in *In re Mitchell* that "it is difficult to draw a rational distinction between a bankrupt's attempt to recover funds already paid to the State from one that seeks to discharge present debts to the State." 209 F.3d at 1117. But we made this observation in the context of an action in which the State was a named party. Such actions are barred by the Eleventh Amendment regardless of the type of relief the plaintiff requests.

seeks only prospective relief.

Goldberg's reliance on *In re Ayers*, 123 U.S. 443 (1887), is similarly misplaced. In *Ayers*, the Court held that a claim for injunctive relief against state officials under the Contracts Clause was barred by state sovereign immunity because the State was the real party in interest. The Court explained that the object of the plaintiffs' action was "by injunction, indirectly, to compel the specific performance of [their] contract" with the State. *Id.* at 502. Because the state officials against whom the injunction was sought were not, themselves, parties to the contract in question, the Court reasoned that the State was the real party in interest. *Id.* at 503-04. Just as the functional equivalent of a quiet title action against a State is barred by state sovereign immunity under *Coeur d'Alene*, *Ayers* stands for the proposition that the functional equivalent of an action for specific performance against a State is likewise constitutionally impermissible. Ellett's action is neither the functional equivalent of a quiet title action nor the functional equivalent of an action for specific performance of a State contract. Accordingly, Ayers is not controlling here.

3

Goldberg further argues that relief pursuant to *Ex Parte Young* is improper because, as he asserts, California state courts have jurisdiction to determine the dischargeability of Ellett's pre-petition state income tax debts. As support, he cites *Schatz v. Franchise Tax Board*, 69 Cal. App. 4th 595 (1999). In *Schatz*, the bankruptcy court had directed a debtor to file an action in state court to determine the date on which a state tax was "assessed" under state law for purposes of a bankruptcy discharge exception. *Id.* at 598-99. The fact that the bankruptcy

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See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (explaining that Eleventh Amendment bars actions against States "regardless of the nature of the relief sought").

court abstained so that state court could decide a complicated issue of state law does not remotely suggest that the bankruptcy court lacked the power to decide the issue itself. Here, too, the availability, *vel non*, of a state forum is simply irrelevant to the question of whether the federal bankruptcy court itself *lacks* jurisdiction to entertain Ellett's *Ex Parte Young* action.

Although Justice Kennedy attached considerable significance to the availability of a state forum to entertain the federal claim in his recharacterization of the *Ex Parte Young* doctrine in *Coeur d'Alene*, that portion of his opinion was joined only by Chief Justice Rehnquist. See *Coeur d'Alene*, 521 U.S. at 270-74. Indeed, in *Agua Caliente*, we expressly held that, under the approach of the *Coeur d'Alene* majority, "the existence of a remedy at law in state court is not a bar to the *Young* exception." *Agua Caliente*, 223 F.3d at 1050.

**B**

Goldberg next contends that the Bankruptcy Code constitutes a "detailed remedial scheme" evidencing Congressional intent to preclude *Ex Parte Young* relief under the reasoning expressed in *Seminole Tribe v. Florida*. In *Seminole Tribe*, the Court held that Congress's attempt to abrogate States' sovereign immunity in the Indian Gaming Regulatory Act ("IGRA") was unconstitutional. 517 U.S. at 72. At the same time, the Court held that the IGRA contained a "detailed remedial scheme" which evidenced Congress's intent to fore-close the availability of *Ex Parte Young* injunctive relief against state officials for violations of the substantive provisions of the IGRA. *Id.* at 74-76.

The IGRA authorized tribes to bring an action in federal court against States that failed to negotiate in good faith with tribes to develop Tribal-State gaming compacts. *Id.* at 49. If the court found that the State failed to negotiate in good faith, the State and tribe would be directed to conclude such a

compact within a 60 day period. If the State and tribe were unable to conclude a compact within this period, a mediator would be appointed to choose one of the compacts proposed by the parties. If the State did not consent to the compact chosen by the mediator, the IGRA provided that the mediator should notify the Secretary of the Interior, who would then prescribe gaming regulations for the tribal lands at issue. *Id.* at 50.

The Court held that this remedial scheme evidenced Congress's intent to "limit significantly" the State's substantive duty under the IGRA to negotiate in good faith with tribes. Id. at 74. The Court contrasted the "quite modest set of sanctions" available under the IGRA with those available in an action brought against a state official under Ex Parte Young, which "would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." Id. at 75. The Court further noted that if the IGRA could be enforced in a suit under *Ex Parte Young*, the intricate remedial scheme established by the IGRA "would have been superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would available under *Ex Parte Young*." *Id.*

While the Bankruptcy Code contains an elaborate scheme relating to the treatment of debtors' state tax obligations, see Part IV, infra, the Code does not contain a detailed *remedial* scheme *limiting* debtors' remedies in enforcing their rights under bankruptcy law against States, as did the IGRA. As discussed above, § 106(a) of the Bankruptcy Code purports to abrogate state sovereign immunity in bankruptcy proceedings. While we held § 106(a) to be unconstitutional in *In re Mitchell* to the extent that it purports to authorize suits against non-consenting States, § 106(a) nevertheless subjects States to the full range of relief ordinarily available under bankruptcy law, including injunctive relief. Further, as discussed in Part II, *supra*, the § 524 discharge injunction is binding on States not withstanding state sovereign immunity. Injunctive relief, of

course, is the very type of relief Ellett seeks. Thus, it cannot be said that Congress intended to "limit significantly" the sort of relief available to debtors against States that violate provisions of the Bankruptcy Code, as the Court found Congress intended to do in the IGRA.

Goldberg argues that the *Seminole Tribe* exception to *Ex Parte Young* applies because the Code purports to subject States as entities, rather than state officials, to the jurisdiction of the bankruptcy courts. However, the mere fact that the Bankruptcy Code does not contain a reference to "state officials" is insufficient to invoke the *Seminole* Tribe exception to *Ex Parte Young*. *See Telespectrum, Inc. v. Pub. Serv. Comm'n of Ky.*, 227 F.3d 414, 420 (6th Cir. 2000) (rejecting notion that "Congress' failure to name individuals in a statute is singularly sufficient to bar relief under *Ex parte Young*"); *Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, (9th Cir. 1996) (holding that provision of Clean Water Act authorizing suit against any "governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution" was sufficient indication that Congress implicitly intended to authorize citizens to bring *Ex Parte Young* suits against state officials). Moreover, state officials who have violated a bankruptcy discharge injunction or automatic stay are subject to contempt sanctions to the same extent as any other creditor who has violated a bankruptcy court order. See, e.g., *In re Rothman*, 76 B.R. 38, 41 (Bankr. E.D. N.Y. 1987) (ordering state tax official to show cause why he should not be held in contempt for violating bankruptcy court's discharge injunction by attempting to collect discharged state tax liabilities).

## IV

Goldberg next contends that the Tax Injunction Act (the "Act"), 28 U.S.C. § 1341, bars Ellett's action for injunctive and declaratory relief. According to Goldberg, the Act evidences

Congress's intent to foreclose *Ex Parte Young* relief in cases such as this, requiring individuals such as Ellett to seek their remedy in state court.

[4] The Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The Court has explained that the Act, passed in 1937, "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations" and "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981). We have explained that the Act "is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems." *Dillon v. Montana*, 634 F.2d 463, 466 (9th Cir. 1980).

There are two inter-related injunctions at issue here: the discharge injunction issued pursuant to 11 U.S.C. § 524 upon completion of Ellett's Chapter 13 plan and the injunction Ellett seeks in the present adversary proceeding under *Ex Parte Young* to compel Goldberg's compliance with the discharge injunction. Because the applicability of the Act to Ellett's *Ex Parte Young* injunction is bound up with the applicability of the Act to the § 524 discharge injunction, we consider the latter issue first.

A

The Bankruptcy Code contains a detailed scheme relating to a debtor's state and federal tax obligations. A brief over view of the Code's treatment of bankruptcy-related tax matters is in order for a proper understanding of the interaction between the Code and the Act.

The filing of a bankruptcy petition invokes the automatic stay of 11 U.S.C. § 362, which bars, inter alia, the collection of pre-petition state taxes. 11 U.S.C. § 362(a)(6); § 106(a)(1); *see, e.g., Adams v. Indiana*, 795 F.2d 27, 29 (7th Cir. 1986). Section § 505 of the Code gives federal courts authority, in bankruptcy proceedings, to "determine the amount and legality of any tax," 11 U.S.C. § 505(a)(1) (emphasis added), except where the amount and legality of the tax has been "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction" prior to the commencement of bankruptcy proceedings, 11 U.S.C. § 505(a)(2)(A). Section 505 provides bankruptcy courts with jurisdiction to resolve state as well as federal tax issues. *See, e.g., City Vending of Muskogee, Inc. v. Okla. Tax Comm'n*, 898 F.2d 122, 124 (10th Cir. 1990).

The Code also provides a complex classification of tax obligations for purposes of dischargeability. Section 507(a)(8) provides priority status to certain "unsecured claims of governmental units," including certain "tax[es] on or measured by income or gross receipts": taxes "for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition"; taxes "assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or taxes "not assessed before, but assessable, under applicable

law or by agreement, after, the commencement of the case." 11 U.S.C. § 507(a)(8)(A)(i), (ii), (iii). Such tax claims receive eighth place priority. *Id.*

Section 523 excepts § 507(a)(8) priority tax claims from discharge in cases under Chapter 7 and Chapter 11. 11 U.S.C. § 523(a)(1)(A). Section 523(a)(1)(A) does not apply to discharges pursuant to § 1328(a); however, under § 1322(a)(2), a debtor's Chapter 13 plan must provide for full payment of all § 507 priority claims. 11 U.S.C. § 1322(a)(2). As discussed above, a discharge in a case under the Code "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor. . . ." 11 U.S.C. § 524(a)(2). Section 106(a)(1) states that § 524 injunctions apply to "governmental units," which include states.

**B**

It is evident that a number of these Code provisions come in direct or indirect conflict with the Tax Injunction Act. For example, the authority conferred on bankruptcy courts by § 505 to "determine the amount and legality of any tax" would appear directly to conflict with the Act, which the Supreme Court has held deprives federal courts of jurisdiction to issue declaratory as well as injunctive relief in matters involving state taxation. *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). A number of courts have addressed this and similar conflicts and have held that the general dictates of the Act do not defeat the specific powers Congress has bestowed upon the federal courts under the Bankruptcy Code, *See, e.g., Adams*, 975 F.2d at 29 (automatic stay bars states from collecting pre-petition taxes notwithstanding Act); *City of Vending of Muskogee*, 898 F.2nd at 124 (while Act generally precludes federal courts from considering challenges to state tax assessments where

taxpayer has failed to pursue state remedies, § 505 specifically grants federal courts jurisdiction to consider such challenges in bankruptcy proceedings); *In re Hechinger Inv. Co.*, 254 B.R. 306 (Bankr. D. Del. 2000) ("To the extent that a bankruptcy court must determine a debtor's tax liability in an area where such a determination may otherwise be barred by the Tax Injunction Act, the overwhelming majority view is that Congress expressly conferred jurisdiction on bankruptcy courts to do so in § 505 of the Code.")

[5] In *California State Board of Equalization v. Goggin*, 191 F.2d 726, 728 (9th Cir. 1951), we considered the applicability of the Act in bankruptcy proceedings. In *Goggin*, a bankruptcy trustee challenged a state sales tax assessment imposed by the California Board of Equalization. The district court concluded that the assessment was improper and enjoined the Board from enforcing the assessment against the trustee. We rejected the Board's argument that the injunction was prohibited by the Act, explaining that the Act did not abridge the power specifically granted to the bankruptcy court to make such judgments as may be necessary for the enforcement of the provisions of the Bankruptcy Act. The process of dealing with state tax assessments is one essential to the administration of a bankruptcy estate and does not amount to a suit against the state.

*Id.* at 728 (internal citations omitted).

While our conclusion in *Goggin* that there was no "suit" against the state under the facts of that case has been under mined by the Supreme Court's more recent state sovereign immunity jurisprudence, our conclusion that the Act "did not abridge the power specifically granted to the bankruptcy court to make such judgments as may be necessary for the enforcement of the provisions of the Bankruptcy Act" remains good law.

**[6]** Furthermore, notwithstanding *Goggin*, it is quite apparent that the Act is incompatible with the Bankruptcy Code's detailed scheme governing the dischargeability of tax debts. As reviewed above, § 523(a)(1) excepts only certain taxes from discharge - priority tax claims as defined by § 507(a)(8) - and even these taxes are excepted from discharge only in certain cases. 11 U.S.C. § 523(a)(1). Obviously, those pre-petition tax obligations (such as those at issue here) that are not excepted from discharge are, by definition, discharged along with the debtor's other dischargeable debts. Since 1970, a bankruptcy discharge order has operated as an "injunction" barring the collection of the debtor's discharged obligations. Pub. L. No. 91-467, 84 Stat. 990. It is thus apparent that § 524 of the Code grants bankruptcy courts the power to enjoin the collection of certain state tax obligations, notwithstanding the Act.[7]

**[7]** Assuming, as we must, the allegations of Ellett's complaint to be true, the disputed income tax obligations were properly discharged upon completion of Ellett's Chapter 13 plan. Hence, Goldberg was already enjoined, by the discharge injunction itself, from "collect[ing], recover[ing] or offset[ing] . . . such [state tax] as a personal liability" of Ellett. 11 U.S.C. § 524(a)(2).

## C

**[8]** The additional injunctive relief Ellet requests against Goldberg in the present adversary proceeding is no more than a device to compel Goldberg's compliance with the existing § 524 discharge injunction. Because Goldberg was already

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7. Of course, to the extent that a bankruptcy court seeks to enjoin the collection of state taxes without relying on the specific authorization provided by § 524 - for example, by attempting to enjoin a state's tax collection efforts against a non-debtor - the court may be subject to the full force of the Act.

properly enjoined from collecting the disputed taxes, notwithstanding the Act's proscription, such additional injunctive relief does not run afoul of the Act either.

**D**

[9] Finally, Goldberg contends that the Tax Injunction Act constitutes a "detailed remedial scheme" precluding *Ex Parte Young* relief under *Seminole Tribe*. According to Goldberg, the limited remedy devised by Congress which forecloses *Ex Parte Young* relief here is a state court remedy pursuant to the dictates of the Act. This argument also fails. For the reasons explained above, the Act does not compel Ellett to pursue his action in state court nor does it preclude a bankruptcy court from issuing injunctive relief in cases such as this.

**V**

For the foregoing reasons, the judgment of the Bankruptcy Appellate Panel is

AFFIRMED.

# APPENDIX B

FILED
Dec 2 1999
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**
**OF THE NINTH CIRCUIT**

| | |
|---|---|
| In re<br><br>JAMES ELLETT,<br>Debtor. | BAP No. EC-99-1122-RBMa<br>Bk. No. 94-25454-A-13<br>Adv. No. 97-2820-A |
| GERALD GOLDBERG, Executive Director of the Franchise Tax Board,<br>Appellant,<br><br>v.<br>JAMES ELLETT,<br>Appellee. | **OPINION** |

Argued and Submitted on October 21, 1999
at Sacramento, California
Filed - December 2, 1999
Appeal from the United States Bankruptcy Court
for the Eastern District of California
Honorable David E. Russell, Chief Bankruptcy Judge,
Presiding

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Before: RUSSELL, BRANDT, and MARLAR, Bankruptcy Judges.

RUSSELL, Bankruptcy Judge:

In an adversary proceeding, the debtor sought a declaration that his prepetition taxes owed to the California Franchise Tax Board ("FTB") had been discharged following the completion of his chapter 13[1] plan. The debtor also sought to enjoin the FTB's executive director, Gerald Goldberg, from taking any action, or causing the FTB to take any action, to collect the allegedly discharged taxes. Concluding that the debtor's suit properly asserted an action under the Ex Parte Young[2] doctrine, the bankruptcy court denied Goldberg's motion to dismiss for lack of jurisdiction. Goldberg appeals. We AFFIRM.

## I. FACTS

The debtor, James Ellett, filed his chapter 13 petition on 16 July 11, 1994. The petition listed an $18,000 unsecured nonpriority income tax obligation owed to the California Franchise Tax Board for various tax years between 1980 and 1990. The FTB was notified of the commencement of the case and was sent a proof of claim form. The agency never filed a proof of claim. The debtor's chapter 13 plan was confirmed by the court on April 20, 1995. He completed his plan payments and received a discharge on April 19, 1997. A copy of the discharge order was served on the FTB and the case was closed.

In October 1997, the FTB sought to collect $21,908.52 from Ellett in allegedly delinquent prepetition taxes for the years 1981, 1983, 1984, 1985, and 1990 by attempting to garnish his wages. He later moved successfully to reopen his bankruptcy case in order to initiate an adversary proceeding on November 13, 1997, Ellett filed his complaint against the FTB's Executive Director, Gerald Goldberg. The complaint sought a declaration that his state income tax liabilities had

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1. Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

2. 209 U.S. 123 (1908).

been discharged. It also sought to enjoin Goldberg from collecting, or causing the FTB to collect, the prepetition taxes.

On February 27, 1998, Goldberg filed a motion to dismiss the adversary proceeding for lack of jurisdiction, alleging that he enjoyed sovereign immunity under the Eleventh Amendment of the United States Constitution. Ellett opposed the motion to dismiss, invoking the Ex parte Young exception to the Eleventh Amendment's jurisdictional bar. A hearing before the bankruptcy court followed on April 20, 1998. The court issued its memorandum of decision on January 11, 1999, finding that the debtor's suit properly asserted an action under Ex parte Young and denying Goldberg's motion. Goldberg was granted an extension of time for filing a notice of appeal and on February 10, 1999, timely filed such notice.

## II. ISSUE

Whether the bankruptcy court properly determined that it had jurisdiction over the debtor's adversary proceeding pursuant to Ex parte Young.

## III. STANDARD OF REVIEW

We review de novo the bankruptcy court's exercise of jurisdiction. In re ACI-HDT Supply Co., 205 B.R. 231, 234 (9th Cir. BAP 1997) (citing In re Harris Pine Mills, 44 F.3d 1431, 1434 (9th Cir.1995); In re Castlerock Properties, 781 F.2d 159, 161 (9th Cir. 1986)). Similarly, the granting or denial of a sovereign immunity defense is an issue of law subject to de novo review. In re HPA Associates, 191 B.R. 167, 171 (9th Cir. BAP 1995).

## IV. DISCUSSION

Whether the debtor's prepetition taxes had been discharged following completion of his chapter 13 plan is the underlying dispute. However, we are limited to the preliminary question whether the Eleventh Amendment bars the bankruptcy court from hearing the debtor's claim. Goldberg argues on appeal that the bankruptcy court does not have jurisdiction to hear the matter on the basis that the sovereign immunity reserved to the FTB under the Eleventh

Amendment extends to him personally. We disagree.

1. **Availability of the Ex parte Young Doctrine**

The Eleventh Amendment recognizes the states' sovereign immunity, providing:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U. S. CONST. amend. XI. A state's immunity from suit has been extended to suits brought by the state's own citizens. Hans v. Louisiana, 134 U.S. 1 (1890). Earlier this century, the Supreme Court framed a limited exception to the states' sovereign immunity in Ex parte Young, 209 U.S. 123 (1908). This exception rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the state. The Young doctrine allows a suit against a state official to go forward where the suit seeks prospective injunctive relief in order to end a continuing violation of federal law. Ex parte Young, 209 U.S. 123, 167 (1908).

An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young doctrine. The doctrine, however, has been the subject of much discussion, most recently in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), on which both parties draw in their briefs. In that case, the Court stated:

> [We] do not question the validity of the Young doctrine, but acknowledge [ ] that questions will arise as to its proper scope and application. In resolving these questions, the Court must ensure that the sovereign immunity doctrine remains meaningful, while also giving recognition to the need to prevent violations of federal law.

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 262 (1997). Though the plaintiffs in Coeur d'Alene sought declaratory and injunctive relief against the state of Idaho, alleging ownership of certain submerged state lands, the Young doctrine was held inapplicable. Id. at 287. The Court reasoned that the plaintiffs' suit was the "functional equivalent of a quiet title action which implicate[d] special sovereignty interests." Id. at 281. Young would ordinarily have been applicable but for the special nature of the suit, which would have required the state to divest itself of lands over which it claimed title.

While Coeur d'Alene may have suggested a new component to the Young analysis-the implication of "special sovereignty interests"-it left unchanged the traditional requirements for Young-type actions. Exactly such an action is present here. The debtor requests an injunction to prohibit Goldberg, director of a state agency, from violating §524(a)(2)[3] by collecting allegedly discharged prepetition taxes. In doing this, he is alleging the violation of federal law and is requesting prospective relief-exactly what is necessary to invoke the Young doctrine. Indeed, his suit fits within the classic definition of Young and the bankruptcy court so found, stating: "The doctrine of Ex parte Young [ ] continues to be available to protect a debtor from a state's post-discharge collection efforts." Memorandum of Decision, January 11, 1999, p. 15. We agree.

**2. Appellant's Challenges to Young Jurisdiction**

Goldberg's brief contests the application of Ex parte Young, albeit in confusing fashion. We now attempt to distill

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3. Section 524 (a)(2) provides:

**11 USC § 524. Effect of discharge**
**(a) A discharge in a case under this title-**

. . . .

**(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived [.]**

and respond to his arguments.

Drawing from Coeur d'Alene, Goldberg challenges the exercise of Young jurisdiction on the basis that it would implicate California's "special sovereignty interest" in the administration of its income tax system. The trial court did not accept this argument. While it recognized that a state's control and administration of its tax collection system lie at the core of its sovereign powers, citing National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 586 (1995), the court did not view the debtor's requested relief as infringing on the system. It explained:

> Debtor's requested relief would not preclude California from assessing any particular tax or otherwise interfere with its ability to administer its tax system. California is not being asked to alter its tax collection scheme or deviate from any state law or regulation. Rather, Debtor simply seeks to enjoin the collection of taxes allegedly discharged in bankruptcy.

Memorandum of Decision, January 11, 1999, p. 13. We are of the same opinion.

It is important to note that the fiscal impact of the debtor's requested relief does nothing to preclude application of Young. The debtor argues correctly that although his injunction may affect the amount of revenues the state may collect from him, such result is not due to any challenge to the state's taxing authority, but rather to the supremacy of the federal discharge order issued in his case. Case law supports his contention. See, e.g., Edelman v. Jordan, 415 U.S. 651, 668 (1974) ("[A]n ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young . . . ."); Natural Resources Defense Council v. California Dep't of Transp., 96 F.3d 420, 422 (9th Cir. 1996) ("[A]n injunction against the state officer is permitted, even if it might, require substantial outlay of funds from the state treasury . . . .").

Goldberg's second challenge to the applicability of

Young maintains that the debtor's action is essentially one brought against the state. Goldberg contends that because the state is the real party in interest, the Eleventh Amendment bars a suit against state officials like himself. His argument-ignores Young itself.

The Supreme Court has noted that '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963)(per curiam)). It went on to explain that the Court has recognized an important exception to this general rule in the form of Ex parte Young. Id. at 102. As we have discussed, the Young exception is clearly applicable. Surprisingly, Goldberg's brief attempts to reargue Young and the well-established principle of law for which it stands. For example, Goldberg suggests that he would not have been sued were it not for his official state capacity. Of course this is true, but Young expressly allows for this. Young and its many descendants render Goldberg's arguments unpersuasive.

Goldberg's third challenge to the applicability of Young explains that Young does not apply when there exists a significant, unresolved issue directly affecting the rights of the state. Until a determination is made that the discharge order affects Ellett's tax debt, Goldberg posits, there exists such an issue. We address this proposition only to conclude that no authority exists to support it.

**3. The Availability of a State Forum**

Both parties mention the Young doctrine's supposed reliance on the absence of a state forum as a basis for jurisdiction. Goldberg addresses this issue in an equivocal manner, while the debtor meets it head-on. In any case, we agree with the trial court that the absence of a state forum has no effect on the application of Young. The court cited relevant case law discounting such a proposition, some of which bears repetition.

The majority of justices in Coeur d'Alene took aim at the

proposition. Justice O'Connor, writing for Justices Scalia and Thomas, explained: "Not only do our early Young cases fail to rely on the absence of a state forum as a basis for jurisdiction, but we also permitted federal actions to proceed even though a state forum was open to hear the plaintiff's claims." Coeur d'Alene, 521 U.S. at 292 (O'Connor, J., concurring). Additionally, Justice Souter, writing for Justices Stevens, Ginsburg, and Breyer, stated: "The principal opinion's is notion that availability of a state forum should have some bearing on the applicability of Ex parte Young is [ ] as much at odds with precedent as with basic jurisdictional principles." Id. at 315-16 (Souter, J., dissenting). These statements speak for themselves and need no further discussion.

**4. The Panel's Previous Discussion of Eleventh Amendment Jurisdiction**

We, too, have had the occasion to address the applicability of Young. See In re Elias, 218 B.R. 80 (9th Cir. BAP 1998). In Elias, a chapter 7 debtor filed an adversary proceeding to determine the dischargeability of state tax debts. Elias, 218 B.R. at 82. In its answer, the California Franchise Tax Board asserted an affirmative defense of sovereign immunity. Id. The trial court granted the state agency's motion to dismiss for lack of jurisdiction and we affirmed. Id. at 87. While acknowledging that § 106(a) reflected Congress' intent to abrogate the states' Eleventh Amendment immunity from suit in federal court, we concluded that Congress lacked the power to do so. Id. at 83-86. We drew our analysis from Seminole Tribe v. Florida, 517 U.S. 44 (1996).

The only other basis for jurisdiction in Elias, in our view, was the Young doctrine. Elias, 218 B.R. at 86. We stated:

> The doctrine of Ex parte Young allows federal jurisdiction over a suit against a state official, when the state itself could not be sued in federal court, and the plaintiff seeks only prospective relief to end a continuing violation of federal law. The Supreme Court in

> Seminole reaffirmed the vitality of this rule. In Elias's case, no state official has been joined. The bankruptcy court did not have the opportunity to exercise jurisdiction over a state official representing CFTB, so it did not have jurisdiction over CFTB by the Ex parte Young doctrine.

Id. (internal citations omitted). Unlike Elias, the case at hand is only against a state official. This is one key difference that allows the exercise of federal jurisdiction over the debtor's action.

## V. CONCLUSION

The debtor's suit falls squarely within the parameters of Ex parte Young. He alleges the violation of federal law and seeks prospective injunctive relief. Recent pronouncements on Young, including our own, do nothing to preclude its availability here. The appellant's arguments to the contrary are not persuasive. We AFFIRM.

BRANDT, Bankruptcy Judge, concurring:

I join in the foregoing opinion, but write separately to observe that section 542(a)(2), quoted in footnote 3, above, may well be a standing Ex parte Young injunction, in effect from the entry of discharge. In re DeAngelis,1239 B.R. 426, 432 (Bankr., D. Mass, 1999).

If that is so, Defendant Goldberg (and others similarly situated) collect on arguably discharged debts at their peril, and he faces the same choice as anyone else who's not sure an injunction bars his contemplated course of action: obtain a judicial determination from the issuing court first, or bear the consequences if in error. Celotex Corp. v. Edwards, 514 US 300, 313 (1995). Further, adversary proceedings such as the one before us could go directly to the question of sanctions upon determination that the debt in question was, in fact, discharged.

# APPENDIX C

ORIGINAL FILED
Jan 11 1999
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
(Sacramento Division)

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|---|---|
| In re:<br><br>JAMES ELLETT,<br><br>Debtor. | Case No.: 94-25454-A-13 |
| JAMES ELLETT,<br><br>Plaintiff,<br><br>v.<br><br>GERALD GOLDBERG,<br><br>Defendant, | Adv. No. 97-2820-A<br><br>M.C. No. CAG-1<br><br>Date Submitted: April 20, 1998 |

George Spanos, Esq. , Deputy Attorney General, Sacramento, California, for Defendant Gerald Goldberg.

Robert Kolb, Esq. , Law Of f ices of Robert N. Kolb, Walnut Creek, California, for Plaintiff /Debtor James Ellett.

MEMORANDUM OF DECISION

This matter comes before the court on defendant Gerald Goldberg's ("Goldberg") Motion to Dismiss the adversary

proceeding for lack of jurisdiction. Debtor James Ellett ("Debtor") filed this adversary proceeding on November 13, 1997 against Goldberg, the Executive Director of the, California Franchise Tax Board ("FTB"), seeking a declaration that his state income tax liabilities for certain years between 1980 and 1990 have been discharged and seeking to enjoin Goldberg from taking any action, or causing the FTB to take any action, to collect these discharged taxes. Goldberg moves to dismiss on the grounds that he enjoys sovereign immunity under the Eleventh Amendment of the United States Constitution. Debtor opposes the Motion to Dismiss, claiming that he may invoke the jurisdiction of this court under the doctrine of Ex parte Young. After a hearing, the court took the matter under submission. For the reasons set forth below, the Motion to Dismiss is DENIED.

## I. FACTUAL BACKGROUND

Debtor filed a petition under Chapter 13 of the Bankruptcy Code on July 11, 1994.[4] The petition duly listed an $18,000 unsecured nonpriority income tax obligation owed to the FTB for various tax years between 1980 and 1990.[5] The FTB was notified of the commencement of Debtor's case and was sent a proof of claim. The FTB never filed a proof of claim.

Debtor's amended Chapter 13 plan was confirmed by the

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4. Unless otherwise indicated, all references to "chapter" and "section/§" are to the provisions of the U.S. Bankruptcy Code, 11 U.S.C.§§ 101-1330.

5. Goldberg does not claim that Debtor's tax obligation was really a priority claim or is otherwise nondischargeable in a Chapter 13. This court, lacks the jurisdiction to entertain a suit
filed directly against a state taxing authority regarding the dischargeability of a state tax debt. See In re Mitchell, 222 B.R. 877, 882-83 (9th Cir. BAP 1998); In re Elias, 218 B.R. 80 (9th Cir. BAP 1998).

court on April 20, 1995.[6] Debtor completed-hid Chapter 13 plan payments and received a discharge on April 19, 1997. The FTB was served with a copy of the court's discharge order. Debtor's case was then closed. In October 1997, the FTB sought to collect $21,908.52 from Debtor in delinquent pre-petition taxes for years 1981, 1983, 1984, 1985, and 1990 by attempting to garnish Debtor's wages. Debtor subsequently filed a motion to reopen his bankruptcy case, which was granted on December 31, 1997.

Debtor seeks a declaratory judgment that his tax obligation to the FTB was discharged by the court's discharge order and requests that Goldberg be enjoined from taking any action, or causing the FTB from taking any action, to collect the pre-petition taxes. Goldberg claims that as a state official, sovereign immunity extends to him.

## II. DISCUSSION

### A. STANDARD FOR MOTION TO DISMISS

Goldberg moves for dismissal under Fed. R.Civ. P. 12(h)(3), made applicable in bankruptcy by Fed. R. Bankr. P. 7012(b), which provides:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter; the court shall dismiss the action.

Fed. R.Civ. P. 12(h) (3) (West 1998). A motion under this rule may be made at any time, and if the court lacks subject matter jurisdiction, the suit must be dismissed. See

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6. Debtor's amended plan proposed a 12 percent distribution to the unsecured creditors. Debtor's original plan proposed to pay 8.10 percent to unsecured creditors. The FTB was sent notice of the proposed distribution under the original plan. Because it did not file a claim, the FTB did not receive any distributions under the amended plan.

Augustine v. United States, 704 F.2d 1074, 1075 n. 3 (9th Cir. 1983); Csibi v. Fusto, 670 F.2d 134, 137 n. 3 (9th Cir. 1982); 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1393 (2nd ed. 1990). When a party asserts Eleventh Amendment sovereign immunity, it claims that the court lacks subject matter jurisdiction. Demery v. Kupperman, 735 F.2d 1139, 1149 n. 8 (9th Cir. 1984), cert. denied sub nom. Rowland v. Demery, 469 U.S. 1127 (1985); Mitchell, 222 B.R. at 879 n. 2.

B. SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Although the language of the text does not require it, the Eleventh Amendment has been interpreted by the United States Supreme Court as barring suits against a state brought by that state's own citizens in federal court without the state's consent. See Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355 (1974); Hans v. Louisiana, 134 U.S. 1, 13-15, 10 S.Ct. 504, 506 (1890); Elias, 218 B.R. at 82. According to the Court, the Eleventh Amendment stands not so much for what it says but for the principle that it confirms. That being the principle of state sovereign immunity, under which "it is inherent in the nature of the sovereignty not to be amenable to suit without its consent." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122 (1996) (citations and internal quotations omitted). State sovereign immunity likewise extends to state officials, such as Goldberg, who act on behalf

of the state. See Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1183 (9th Cir. 1997) ; Natural Resources Defense Council v. California Dept. of Transp., 96 F.3d 420, 421 (9th Cir. 1996).

However, state officials may be subject to suit in federal court in their individual capacities under the doctrine articulated by the Supreme Court in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908). Id. "The doctrine of Ex parteYoung allows federal jurisdiction over a suit against a state official, when the state itself could not be sued in federal court, and the plaintiff seeks only prospective relief to end a continuing violation of federal law." Elias, 218 B.R. at 86. See also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261,__, 117 S.Ct. 2028, 2043 (1997) (O'Connor, J., concurring in the judgment); Natural Resources Defense Council, 96 F.3d at 442; ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1187-88 (10th Cir. 1998).

The Young doctrine is premised on the notion that the state can not authorize a state officer to violate federal law. Natural Resources Defense Council, 96 F.3d at 422. Thus, an action by an official that violates federal law is not considered an act by the state and the state can not cloak that officer in its sovereign immunity. Id.; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104 S.Ct. 900, 908 (1984); Ex parte Young, 209 U.S. at 159-60, 28 S.Ct. at 453-54. The doctrine does have limitations. A federal court can not award monetary damages or other retrospective relief designed to remedy past violations of federal law. See Edelman, 415 U.S. at 668, 94 S.Ct. at 1358. A declaratory judgment and injunction are, however, appropriate forms of prospective relief. See, e.g., Coeur d'Alene, 117 S.Ct. a 2034 (Young doctrine permits "suits seeking declaratory and injunctive relief against state officers in their individual capacities."); In re Kish, 221 B.R. 118, 137 (Bankr. D. N.J. 1998) (citing various cases). Here, by requesting an injunction to prohibit Goldberg, in his capacity as director of

the FTB from violating § 524 (a) (2)[7] by taking action to collect allegedly discharged pre-petition taxes, Debtor clearly seeks prospective relief.[8] This is "ordinarily sufficient" to invoke the Young doctrine. Coeur d'Alene, 117 S.Ct. at 2040.

However, the Supreme Court has recently articulated limitations on the applicability of the Young doctrine that we

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7. Section 524 of the Bankruptcy Code provides:

(a) A discharge in a case under this title-
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(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such is waived. . .

11 U.S.C. § 524 (a) (2) (West 1998).

8. Goldberg argues that Debtor's action is really against the state's tax agency and that naming him as the defendant is merely a subterfuge to avoid the subject matter limitations of the Eleventh Amendment. "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" Pennhurst, 465 U.S. at 101, 104 S. Ct. at 908 (quoting Ford Motor Co. v. Dent. of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945)). The general rule is that relief sought nominally against an officer is in fact against the state if the decree would operate against the latter. Id. (citations omitted).

However, an action brought under Ex parte Young can not be an action against the state because the allegation being made is that the officer is violating federal law. This strips the state officer of his official authority since the state could never have authorized the violation. 465 U.S. at 102-3, 104 S.Ct. at 909. We realize, of course, that this is a fiction and that the state will ultimately bear the burden of the remedy issued against the officer. 465 U.S. at 114 n. 25, 104 S.Ct. at 915 n. 25. Nevertheless, the fiction is necessary. The Young doctrine is an attempt to balance the principles of sovereign immunity with the necessity of providing federal courts the authority to vindicate federal rights and hold state officials responsible to the supreme authority of federal law. 465 U.S. at 104-5, 104 S.Ct. at 910. As such, Young actions are not against the state and are not barred by the Eleventh Amendment.

must consider. First, in Seminole Tribe of Florida v. Florida, the Supreme Court held that the Ex parte Young doctrine can not be invoked where "Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right." 517 U.S. at 74, 116 S.Ct. at 1132. In that case, the Seminole Tribe of Indians brought suit in federal court against the Governor of Florida under the Young doctrine for his alleged failure to have the state comply with the requirements of the federal Indian Gaming Regulatory Act (the "IGRA"). Congress passed the IGRA in order to provide a statutory basis for the operation and regulation of gambling activities on tribal lands. Under this Act, a state and Indian tribe are required to negotiate a compact which would regulate the gaming permitted on Indian land located within the state.

In the IGRA, Congress created a detailed set of step-by-step procedures regarding the creation of a compact. First, the Indian tribe was required to request the state to enter into negotiations to create a compact. Upon receiving such a request, the state was required to negotiate in good faith. If the state did not do so, the Act authorized the tribe to file suit in federal district court to obtain an order requiring the state to negotiate in good faith. If within 60 days of the order a compact has not been concluded, the tribe and state were required to submit their own proposed compacts to' a court appointed mediator who would then choose which compact applied. If the state did not consent to a compact chosen by the mediator, the mediator was required to notify the Secretary of the Interior. The Secretary would then prescribe the procedures that would govern gaming on the Indian land.

The Supreme Court held that allowing a tribe to bring an Ex Parte Young suit to enforce the IGRA would enable it to disregard Congress's intent that this. detailed remedial procedure be followed, thereby rendering the statutory scheme "superfluous." See 517 U.S. at 73-76, 116 S.Ct. at 1132-33. The Young doctrine, a judicially created doctrine, can not be used to usurp a statutorily prescribed remedial

procedure. Moreover, the Court noted that allowing a Young suit would expose a state official to a broader range of sanctions than Congress had intended. Under a Young suit, a state official is exposed to the full range of the court's power, including contempt sanctions, while the IGRA procedures merely exposed the state to the "quite modest" sanction of having the Secretary of Interior determine the extent of gambling on Indian land. See 517 U.S. at 74-75, 116 S.Ct. at 1132-33. Therefore under Seminole Tribe, the federal courts are precluded from permitting a suit under Ex parte Young when Congress has crafted a significantly narrower statutory remedy.

The Bankruptcy Code, on the other hand, does not contain a remedial statutory scheme available to debtors in the event that a state violates a Code provision. See, e.g., In re Guiding Light Corp., 213 B.R. 489, 492 (Bankr. E.D. La. 1997); In re Lazar, 200 B.R. 358, 383 (Bankr. C.D. Cal. 1996); Gibson, *Sovereign immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 215 n. 137 (1996). This conclusion is suggested by the structure of the Bankruptcy Code itself. In § 106 (a), Congress abrogates the states sovereign immunity to suit in federal court. 11 U.S.C. § 106(a). Although that provision has recently been held to be unconstitutional, Elias, 218 B.R. 80, Congress would have had no need to abrogate immunity if it had created an alternative remedial scheme to which the states would be subject. In other words, if Congress had prescribed a remedial scheme of the kind found in the IGRA in bankruptcy, there would not have been any need to enact § 106 (a). Section 106 (a) can not be read as a superfluous provision.[9] See In re Pacific-Atlantic Trading Co., 64 F.3d

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9. Moreover, the Seminole Tribe, Court itself suggested that its decision did not completely preclude federal jurisdiction over the states in various areas including bankruptcy. See 517 U.S. at 72 n. 16, 116 S. Ct. at 1131 n. 16. The Court noted that Ex parte Young could still be used to ensure compliance with federal law. Id. By citing bankruptcy specifically, the

1292, 1303 (9th Cir. 1995); Mitchell, 222 B.R. at 883. Accordingly, we conclude that the holding of Seminole Tribe is not a barrier to Debtor's present action under Ex parte Young.

The second narrowing of the Young doctrine occurred in Idaho v. Coeur d'Alene Tribe of Idaho. In that case, the Coeur d'Alene Indian tribe brought suit in federal court against the State of Idaho and various state officials asserting exclusive title in the banks and beds of all waterways (the "submerged lands") surrounding Lake Coeur d'Alene and its adjoining rivers. The tribe claimed title to these lands pursuant to a grant of title by the federal government. The tribe sought a declaratory judgment establishing its exclusive rights over the land as well as a declaration of the invalidity of all Idaho statutes and ordinances which purported to regulate or affect the submerged lands in any way. Finally, it sought an injunction to prohibit state officials from taking any action in violation of the tribe's exclusive use of the land. The Ninth Circuit permitted the tribe's claims for declaratory and injunctive relief against the state officials under the Young doctrine insofar as they sought to preclude continuing violations of federal law. A highly fractured Supreme Court reversed, holding that the tribe's suit for declaratory and injunctive relief could not be asserted under Ex parte Young.[10]

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Court, at the very least, implied that the Bankruptcy Code did not contain a remedial scheme analogous to the IGRA that would have precluded a suit under Young.

10. Justice Kennedy wrote the principle opinion for the Court, but key provisions of his opinion garnered only the vote of Chief Justice Rehnquist. See 117 S.Ct. at 2031 (Kennedy, J. principle opinion, with Rehnquist, C.J., as to Parts II.B, II.C, and II.D). Justice Kennedy proposed that the Ex parte Young doctrine should be applied using a case-by-case balancing approach. Id. at 2039.

Justices O'Connor, Scalia and Thomas agreed that the tribe's suit should not be permitted under Young, but rejected adopting a case-by-case approach. See 117 S.Ct. at 2046 (O'Connor, J., concurring in the judgment,

A majority of the justices held that Ex parte Young should not apply because the relief being sought would infringe upon Idaho's "special sovereign interests." 117 S.Ct. at 2040. The Court in Coeur d'Alene found that the tribe's suit was "the functional equivalent of a quiet title action." Id. The declaratory and injunctive relief being requested by the tribe would essentially extinguish Idaho's control over vast reaches of land and waters deemed by the state to be an. integral part of its territory. State control and jurisdiction over submerged lands has long been considered "an essential attribute of [state] sovereignty." Id. 2041. Granting the requested relief would have significantly diminished Idaho's sovereign authority. Therefore, allowing federal jurisdiction over such a suit would be as intrusive into core aspects of state sovereignty as permitting a retroactive award of damages. Id. at 2043. Accordingly, under sovereignty. Id. at these particular and special circumstances, the Eleventh Amendment is an absolute bar to federal jurisdiction and can not be circumvented by application of the Ex Parte Young doctrine. Id.

Coeur d'Alene can therefore be read as imposing an important new requirement on federal courts as part of the Ex Parte Young analysis. A court must examine whether the

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with Justices Scalia and Thomas). They believed that Ex parte Young should not apply because the tribe's action sought to quiet title and eliminate Idaho's
authority to regulate the submerged lands altogether. Id. at 2043-44. In their view, the tribe was not seeking to bring the state into compliance with federal law, but to completely extinguish the state's authority over the land.

The dissenting justices also rejected adopting a case-by-case approach to the Young doctrine but felt the fact that the tribe's action might preclude Idaho's regulation of the submerged land to be irrelevant to the Young analysis. See 117 S.Ct. at 2047 (Souter, J., dissenting, with Justices Stevens, Ginsburg, and Breyer). The dissent believed that the tribe's claims to exclusive right to the lands under federal law and their allegation that state officials are violating federal law by exercising authority over the lands were sufficient to sustain a
suit under Young.

relief being sought against a state official "implicates special sovereignty interests." If the requested relief would intrude into core aspects of state sovereignty to the same extent as a legal remedy otherwise barred by the Eleventh Amendment, Ex parte Young may not be used to confer jurisdiction upon the federal court. See ANR Pipeline, 150 F.3d at 1190.

In this case, Goldberg claims that Debtor's suit implicates California's administration of its income tax system. A state's control and administration of its tax collection system certainly lies at the core of its sovereign powers. See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 586, 115 S. Ct. 2351, 2354 (1995) ("We have long recognized that principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration."); ANR Pipeline, 150 F.3d at 1193 ("a state, interest in the integrity of its tax system lies at the core of the state's sovereignty"). As such, it can not be challenged in federal court under Ex parte Young. ANR Pipeline, 150. F.3d 1178 (applying Coeur d'Alene to deny federal jurisdiction over a suit brought under Ex parte Young seeking to alter Kansas' property tax system that favored certain industries over others).

However, Goldberg overstates the nature of the relief Debtor seeks. Debtor's requested relief would not preclude California from assessing any particular tax or otherwise interfere with its ability to administer its tax system. California is not being asked to alter its tax collection scheme or deviate from any state law or regulation. Rather, Debtor simply seeks to enjoin the collection of taxes allegedly discharged in bankruptcy. California and its taxing authorities are subject to the prohibition against collecting a discharged debt found in § 524 (a) (2) under the Supremacy Clause of the federal Constitution. The mere fact that California may lose some tax revenue by a discharge is not sufficiently intrusive to preclude a suit under Ex Parte Young. See Edelman, 415 U.S. at 668, 94 S.Ct. at 1358

(doctrine of Ex Parte Young will allow injunctive relief that might have a substantial ancillary effect on a state treasury); Natural Defense Council, 96 F.3d at 422 (same). Therefore, the remedy Debtor seeks would not infringe upon California's "special sovereign interests."

Citing Justice Kennedy's principle opinion in Coeur d'Alene, Goldberg also argues that Debtor can not proceed under Ex parte Young because there exists an available state court forum to adjudicate his claims. See 117 S.Ct. at 2035 (Kennedy, J.) ("Young has been applied . . . where there is no state forum available to vindicate federal interests"). However, implanting such a requirement into the Young doctrine was expressly rejected by a majority of the justices in Coeur d'Alene. See 117 S.Ct. at 2045 (O'Connor, J., concurring) ("Not only do our [] Young cases fail to rely on the absence of a state forum as a basis for jurisdiction, but we also permitted federal actions to proceed even though a state forum was open to hear the plaintiff's claims."); 117 S.Ct. at 2057 (Souter, J., dissenting) ("The principle opinion's notion that availability of a state forum should have some bearing on the applicability of Ex parte Young is [] as much at odds with our precedent as with basic jurisdictional principles."). We thus agree with the Tenth Circuit that given the statements of the concurring and dissenting justices in Coeur d'Alene, "an Ex parte Young injunction still may issue even when the state courts would provide an adequate forum for the plaintiff's [] claims." ANR Pipeline, 150 F.3d at 1192. See also Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1998) (not applying those aspects of Justice Kennedy's Coeur d'Alene opinion that were rejected by the remainder of the Court); Earles v. State Bd. of Certified Public Accountants of La., 139 F.3d 1033, 1039 (5th Cir.) ("a majority of the [Supreme] Court would continue to apply the rule of Ex Parte Young as it has been traditionally understood"), cert. denied, 119 S.Ct. 444 (1998); Kish, 221 B.R. at 139 (same).

The doctrine of Ex parte Young thus continues to be available to protect a debtor from a state's post-discharge

collection efforts. Either the state court can determine the dischargeability of the tax debt through a state proceeding or a federal court applying Ex parte Young can make that determination.[11] Moreover, in Coeur d'Alene Justice Kennedy believed that the Young doctrine should not apply because a forum to litigate the tribe's title claim was expressly provided for under state law.[12] See Idaho Code § 5-328 (1997) (waiving Idaho's sovereign immunity in state court to allow the state to be a party in any action affecting the title to real property where it has a claim or interest). In this case however, the California Constitution prohibits a state court from enjoining the collection of a tax and requires the party challenging the legality of a tax assessment to first pay the amount assessed. CAL. CONST. art. XIII, § 32.[13]

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11. In Chapter 13, In Chapter 13, only those debts provided for under the plan and that are dischargeable can be discharged. 11 U.S.C. § 1328 (a). Here, Debtor's plan provided for partial payment of his state tax obligation but the FTB was not paid because it did not file a proof of claim. Before this court can enjoin Goldberg's collection efforts, we must determine the dischargeability of the tax because only if the debt was dischargeable would Goldberg be violating § 524 (a) (2). This creates the situation where this court could not issue a judgment holding a state tax debt to' be dischargeable when the state is sued directly, see footnote 2, but must make that determination before issuing an injunction under Ex parte Young. Thus, absent some post-discharge collection effort, a debtor can not seek a determination of the dischargeability of a state tax debt in this court.

12. Justice Kennedy Stated:

> In this case, there is neither warrant nor necessity to adopt the Young device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State. Idaho's courts are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment.

Couer d'Alene, 117 S.Ct. at 2036.

13. Article 13, section 32 of the California Constitution provides:

> Sec. 32. No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of the tax claimed to be illegal, an action may be maintained to recover

See also In re Neary, 220 B.R. 864, 869 (Bankr. E.D. Pa. 1998) (look to state law to determine the availability of an adequate state forum). Thus, there is no state forum available to grant the relief that Debtor seeks, enjoining Goldberg's ongoing collection efforts in violation of federal law.[14] See CAL. REV. & TAX. CODE § 19381 (West 1994); Connolly v. County of Orange, 1 Cal.4th 1105, 1114, 824 P.2d 663, 668-69 (1992) (a California court can not enjoin the collection of a tax); Franchise Tax Board v. Superior Court (Suffice Life Ins. Co.), 164 Cal.App.3d 526, 542-44 (1985) (FTB can not be enjoined from collecting income tax). It is left to this court to ensure the supremacy of federal law. Accordingly, we conclude that the Supreme Court's decision in Coeur d'Alene does not preclude Debtor from pursuing his action against Goldberg under the Young doctrine.

## III. CONCLUSION

Debtor's suit seeking declaratory relief and an injunction to top Goldberg Is alleged ongoing violation of § 524 (a) (2) properly asserts after action under the doctrine of Ex parte Young. There is no narrower statutory scheme available to vindicate Debtor's rights under the Bankruptcy Code nor does Debtor's requested relief implicate California's special sovereignty interests. We therefore have subject matter jurisdiction to entertain Debtor's suit. Goldberg's Motion to

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the tax paid, with interest, in such a manner provided by the Legislature.

CAL. CONST. art. XIII, § 32 (West 1996).

14. Justice Kennedy seems to have anticipated the potential of this very problem in Coeur d'Alene and left open the possibility of federal jurisdiction under such circumstances. Without expressing an opinion on the issue, he noted that there may be "circumstances in which the unavailability of injunctive relief in state court would raise constitutional concerns under current doctrine." 117 S.Ct. at 2035. That is the situation that arises in this case.

Dismiss is DENIED. The foregoing shall constitute the court's findings of fact and conclusions of law. An appropriate order shall issue.

DATED: JAN 11 1999

DAVID E. RUSSELL
DAVID E. RUSSELL
CHIEF BANKRUPTCY JUDGE

# APPENDIX D

FILED
JUL 11 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| In re: CARMINE ARTIGLIO,<br><br>Debtor.<br><br>E. LES SORENSON, Executive Director, California State Board of Equalization,<br><br>Appellant,<br><br>v.<br><br>CARMINE ARTIGLIO,<br><br>Appellee. | No. 00-56144<br><br>B.A.P. No. EC-99-01797-KMaJ<br><br>**MEMORANDUM**[1] |

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Klein, Marlar, and Jaroslovsky, Bankruptcy Judges, Presiding

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

Argued and Submitted May 16, 2001
San Francisco, CA

BEFORE: O'SCANNLAIN, TASHIMA, and THOMAS, Circuit Judges.

E. Les Sorenson, Executive Director of the California State Board of Equalization ("SBE"), appeals a judgment of the Bankruptcy Appellate Panel reversing the bankruptcy court's order dismissing Carmine Artiglio's adversary proceeding on sovereign immunity grounds. Artiglio brought an action against Sorenson under Ex Parte Young, 209 U.S. 123 (1908), seeking a declaratory judgment from the bankruptcy court that certain state sales taxes he owed to the SBE were discharged in his Chapter 7 proceeding and seeking injunctive relief barring Sorenson from taking further action to collect such taxes. The facts and prior proceedings are known to the parties; they are not restated here except as necessary.

Sorenson contends that Artiglio's action falls within one of the exceptions to the Ex Parte Young doctrine the Supreme Court articulated in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), and Seminole Tribe v. Florida, 517 U.S. 44 (1996). Sorenson further contends that the State is the real party in interest in Artiglio's adversary proceeding, and hence that this action is barred by state sovereign immunity. Finally, Sorenson contends that the Tax Injunction Act, 28 U.S.C. § 1341, precludes the bankruptcy court from issuing the injunctive and declaratory relief Artiglio seeks here.

Sorenson's arguments are identical to the arguments we rejected in our recent decision in Goldberg v. Ellett, No. 00-15128 (9th Cir. filed _____). Goldberg thus directly controls this appeal. Accordingly, the Bankruptcy Appellate Panel is AFFIRMED.

# APPENDIX E

FILED
JUN 7 2000
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**NOT FOR PUBLICATION**

UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR NINTH CIRCUIT

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| In re<br><br>CARMINE ARTIGLIO,<br><br>Debtor.<br><br>CARMINE ARTIGLIO<br><br>Appellant,<br><br>LES SORENSON, Executive Director, State Board of Equalization,<br><br>Appellee. | BAP No. CC-99-1797-KMaJ<br><br>Bankr. No. SA 98-26788-RA<br><br>Adv. No. SA 99-01578-RA<br><br>**MEMORANDUM**[1] |

Argued and Submitted on May 17, 2000 at Pasadena, California

1. This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1 and 9th Cir. Rule 36-3.

Filed - June 7, 2000

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robert W. Alberts, Bankruptcy Judge, Presiding.

Before: KLEIN, MARLAR, and JAROSLOVSKY[2], Bankruptcy Judges. A chapter 7 debtor brought an adversary proceeding against an adversary proceeding against a state official seeking declaratory and injunctive relief from post-discharge tax collection efforts. The state official moved dismiss on Eleventh Amendment immunity grounds. The bankruptcy court granted the motion to dismiss, and the debtor appeals. We REVERSE.

## FACTS

Debtor Carmine Artiglio ("debtor") filed his chapter 7 petition on December 16, 1998. The debtor had been the sole proprietor of C & A Auto Sales. In his petition, on Schedule D, he listed tax debts to the State Board of Equalization ("SBE") totaling $245,000.[3] The tax claims arose from audits the SBE conducted of C & A Auto Sales that revealed the full amount of California sales tax for cars sold by C & A Auto Sales had not been paid or reported for several years.

The SBE received notice of the debtor's petition. The SBE not file a proof of claim.

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2. Hon. Alan Jaroslovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

3. The following is the breakdown of the tax debt:
$170,000 for the period from 9/91 to 6/93.
$ 75,000 for the period from 7/93 to 1/94.

The debtor received his discharge on March 29, 199., and the case was closed on April 8, 1999. Subsequently, the SBE seized debtor's federal income tax refund as a collection effort on the tax debt.[4]

The debtor's motion to reopen his case was granted on August 1999. The debtor filed an adversary proceeding against E. Les Sorenson, the executive director of the. SBE ("Sorenson"), on July 30, 1999. The complaint sought declaratory and injunctive relief under 11 U.S.C. § 523 and § 524. The declaratory relief sought was the determination that the debt is dischargeable. The debtor sought injunctive relief in the nature of an injunction to prevent Sorenson or anyone under his supervision from continuing to attempt to collect on the tax debt.

Sorenson and the SBE filed a motion to dismiss under Federal of Civil Procedure 12(b)(1), (b)(6), and (h)(3), as incorporated by Federal Rule of Bankruptcy Procedure 7012(b). The motion was based on the Eleventh Amendment immunity of the SBE.

A hearing on the motion was held on November 18, 1999. The bankruptcy court held that under 11 U.S.C. § 1334(b) there was concurrent jurisdiction over the § 523 dischargeability count and that the state court provided an adequate forum for the debtor to seek a determination of whether the tax debt was dischargeable. The bankruptcy court further held that the debtor's action was against the state and the "[Ex parte] Young doctrine doesn't give you an end run in this context to stop the state from collecting tax.", The bankruptcy court granted the motion to dismiss the adversary

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4. The debtor contends that the tax refund was in fact his ex-spouse's property pursuant to their prenuptial property agreement.

proceeding.

This appeal ensued.

## ISSUE

Whether the bankruptcy court erred in dismissing the adversary proceeding pursuant to the Eleventh Amendment and the Ex parte Young doctrine.

## STANDARD OF REVIEW

The bankruptcy court's exercise of discretion is reviewed de novo. Goldberg v. Ellett (In re Ellett), 243 B.R. 741, 743 (9th Cir. BAP 1999). The grant or denial of a sovereign immunity defense is an issue of law reviewed de novo. Id.

## DISCUSSION

This panel's recent decision in Ellett is squarely on point and controls our analysis. In Ellett, a chapter 13 debtor brought an adversary proceeding seeking a declaration that his prepetition taxes had been discharged and to enjoin Goldberg, the director of the State Franchise Tax Board, from any further post discharge tax collection efforts. Id. at 742-43. The panel in Ellett rejected Goldberg's argument that Ex parte Young did not apply, and that therefore the adversary proceeding was barred by the Eleventh Amendment. Id. at 746.

The SBE's main arguments in this appeal mirror the Tax Board's arguments in Ellett.[5] The SBE's first contention is

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5. Both sides concede that abstention is not at issue on appeal. The SBE contends that the applicability of the Tax junction Act, 11 U.S.C. § 1341, is not an issue on appeal. The debtor contends that it is, but it is not necessary to reach that issue to decide this appeal.

that although Sorenson is named as the defendant, the real party in interest is the SBE, and the SBE is immune pursuant to the Eleventh Amendment. This argument "ignores Young itself." Id. at 745.Under the doctrine of Ex parte Young, state officials may be subject to suit in federal court in their individual capacities. Alden v. Maine, 119 S. Ct. 2240, 2263 (1999); Ellett v. Goldberg (In re Ellett)("Ellett I"), 229, B.R. 202, 205 (Bankr. E.D. Calif. 1998). Ex parte Young allows federal jurisdiction over suits against state officials when the state cannot be sued and the suit seeks only prospective relief from continuing violation of federal law. Elias v. United States (In re Elias), 218 B.R. 80, 86 (9th Cir. BAP 1998); aff'd slip op. 2000 WL 431589 (9th Cir. 2000).

The Supreme Court recently noted in Alden:

Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law . . . Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the state. [Cites.]
*The rule, however, does not bar certain actions against state officers for injunctive or declaratory relief.*
[Emphasis added.]

Alden, 119 S. Ct. at 2267. The Court cited In re Ayers, 123 U.S. 443, 506 (1887), which noted that sovereign immunity does not "forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

The debtor's adversary proceeding sought declaratory relief that the tax debt was discharged and an injunction against further collection efforts. "A declaratory judgment and injunction are . . appropriate forms of prospective relief." Ellett I, 229 B.R. at 205; citing Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) A dischargeability action is nothing more than an action for declaratory relief. As such, it falls squarely within the types of action permitted by Alden, Ayers, and Ex parte Young. Ellett, 243 B.R. at 746.

The SBE argues that even if Ex parte Young were applicable, there has been no violation of federal law because there has been no determination that the debt has actually been discharged. The bankruptcy court also held that there had been no judicial determination that the debt had been discharged. However, an actual judicial determination is not necessary. Like the debtor in Ellett, the debtor's complaint sought an injunction from violation of 11 U.S.C. § 524(a) (2) by the collection of "allegedly discharged prepetition. taxes." 243 B.R. at 743 (emphasis added). Judge Brandt's concurrence in Ellett, in fact, noted that "§ 524(a) (2) may well be a standing Ex Parte Young injunction, in effect from the entry of discharge." Id. at 747, citing In re DeAngelis, 239 B.R. 426, 432 (Bankr. D. Mass. 1999). The SBE's argument that there is no violation of federal law because there has been no determination that the debt has been discharged is therefore unpersuasive.

Lastly, the SBE argues that the bankruptcy court was correct holding that Ex parte Young is not applicable because the debtor can pursue his rights in state court due to the concurrent jurisdiction of 11 U.S.C. § 1334(b).

The debtor and the SBE disagree over whether the debtor would be required to pay the tax debt in full before being able to pursue his claim in state court. The issue of prepayment, however, is not determinative. The absence of a state forum is

not a prerequisite for Ex parte Young jurisdiction. Ellett, 243 B.R. at 746, citing Coeur d'Alene, 521 U.S. at 292, 315-16.

Moreover, Alden makes it doubtful that California is required to provide any forum to debtors for the enforcement of their bankruptcy discharges. Our failure to provide the debtor a remedy under Ex parte Young would, in all likelihood, leave the debtor no remedy, at least until the SBE actually attempted to seize his assets. This is no remedy at all, as dischargeability actions are intended to remove uncertainty so that the debtor can begin a new life unfettered by discharged debts.

## CONCLUSION

The debtor alleged violation of federal law and- brought an adversary proceeding seeking prospective injunctive relief. The doctrine of Ex ParteYoung was the proper basis for jurisdiction of the bankruptcy court. We therefore REVERSE the bankruptcy court's dismissal of the debtor's adversary proceeding.

# APPENDIX F

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

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| In re:<br><br>CARMINE ARTIGLIO,<br><br>Debtor. | Case No.<br>SA98-2678-RA<br><br>Santa Ana, California<br>Thursday, November<br>18, 1990<br>9:30 A.M. |
| STATE BOARD OF EQUALIZATION, LES SORENSON,<br><br>Movants,<br><br>v.<br><br>CARMINE ARTIGLIO,<br><br>Respondent. | Chapter 7<br><br>Motion to Dismiss Pursuant to Federal Rules of Bankruptcy Procedure 70-12(b)(1); 7012(b)(6); 7012(h)(3) |
| CARMINE Artiglio,<br><br>Plaintiff,<br><br>v.<br><br>E. LES SORENSON,<br><br>Defendant. | Adversary No.<br>SA99-01578-RA |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT W. ALBERTS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

| | |
|---|---|
| For Movant, State Board of Equalization; E. Les Sorenson: | ANTHONY SGHERZI<br>Office of the Attorney General<br>300 S. Spring St., Room 5212<br>Los Angeles, CA 90013<br>(213) 897-2488 |
| For Debtor: | THOMAS LAMONS<br>LINAS UDRYS<br>Joseph E. Mudd,<br>A Professional Law Corp.<br>8001 Irvine Center Drive<br>Suite 1170<br>Irvine, CA 92618-2997<br>(949) 453-1012 |
| Court Recorder: | MICHELLE MAXON<br>U.S. Bankruptcy Court<br>411 W. 4th Street, Suite 2030<br>Santa Ana, CA 92701-4593<br>(714) 338-5300 |
| Transcription Service: | V/ARS, Inc.<br>2430 K Street, Suite 100<br>Sacramento, CA 95816<br>(916) 448-2457 |

Proceedings recorded by electronic sound recording.
Transcript
produced by transcription service.

SANTA ANA, CALIFORNIA, THURSDAY, NOVEMBER 18, 1999, 9:30 A.M.

THE COURT: Good morning again.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: Would the extern please Call the 9:30 calendar.

EXTERN: Now calling the 9:30 calendar for November 18th, 1999. Item No. 2 in the matter of Carmine Artiglio. Movant: State Board off Equalization, Les Sorenson. Respondent: Carmine Artiglio. Motion to dismiss pursuant to Federal Rules of Bankruptcy Procedure, 7012(b)(1), 7012(b)(6), and 7012(h)(3).

Parties, please make appearances.

MR. SGHERZI: Good morning, Your Honor. Anthony Sgherzi, Deputy Attorney General, appearing on behalf of the State Board of Equalization and E. Les Sorenson.

MR. LAMONS: Good morning, Your Honor. Tom Lamons appearing on behalf of Carmine Artiglio, and with

me Linas Udrys.

MR. UDRYS: Good morning, Your Honor.

THE COURT: Good morning.

MR. LAMONS: Good morning.

THE COURT: Parties ready to proceed?

MR. LAMONS: Yes, Your Honor.

THE COURT: Okay. The tentative is for the reasons urged by the movant and noting that jurisdiction is concurrent, not exclusive, under 28 U.S.C. 1334(b), the motion would be granted and the adversary proceeding dismissed.

Does anybody wish to be heard on the tentative?

MR. LAMONS: Yes, Your Honor.

THE COURT: Proceed.

MR. LAMONS: First of all, Your Honor, responding to the motion itself, the complaint that was filed in this case only names E. Les Sorenson as the defendant. The SBE is not joined as a party in the action because under ex parte Young, only an action against an individual state

official is permissible.

The complaint –

THE COURT: Excuse me. You can assume I've read your papers.

MR. LAMONS: Okay. The -- and so we believe and based on those arguments that the case is properly brought in this Court to seek to restrain ongoing collection activities which violate the bankruptcy stay.

Under state law, the only remedy that's available to the debtor would be to fully pay the assessment amounts which are in excess of $200,000 and then to file a claim for refund.

THE COURT: Why can't the debtor file a complaint in the state court to determine if the debt was discharged?

MR. LAMONS: I'm not aware of any procedure in state court that permits that, Your Honor.

THE COURT: Isn't there concurrent jurisdiction? Isn't that precisely what you can do?

Now, I don't know what happens in the interim with respect to the enforcement, if there's no injunctive relief or stay. I suppose you might end up with some sort of administrative nightmare, but the perception of this Court is that with concurrent jurisdiction, you can file a complaint in the state court to determine the dischargeability of the debt or the effect of the discharge, if you will, just, as if you were filing in a Bankruptcy Court.

But by virtue of the sovereign immunity, you can't do it in this Court unless it's waived.

Now, there's some interesting distinctions that are being made in some courts which you've cited in your papers and which I'm somewhat familiar with already anyway as to whether it's an action against the state and that sort of thing.

But I think the better reasoning at this point is that it is an action against the state and that the Young doctrine doesn't give you an end run in this context to stop the state from collecting the tax --

MR. LAMONS: Let me -- and let me speak to that.

THE COURT: -- because there's been no -- excuse me. There's been no determination. There's been no judicial determination, and I'm speaking extemporaneously now obviously.

There's been no judicial determination that the debt has or hasn't been discharged. They're not violating it. There's got to be a determination, and you can get that determination in the state court.

Now, there's an interesting case I think out of the northeast where arguably there was no recourse. I don't think it was a bankruptcy case.

And the state couldn't be sued in the state court or in the federal court. And I think the Supreme Court basically said the sovereign immunity applied so that they couldn't be sued in the federal court, and if therefore there was no remedy in the state court under state law, there was no remedy.

I'm speaking from memory. I don't have the citation, and it was something that I didn't study, just I remember reading in the last month or two because sovereign immunity

is a significant issue.

Matter of fact, Justice Thomas was in Orange County a few weeks ago, and we had a little informal get-together, and I -- he asked the bankruptcy judges out and I don't think I'm speaking out of Court now or out of turn, but what's the hot issues before the Bankruptcy Court.

And I kind of piped up saying sovereign immunity seems to be pretty hot from where I'm sitting. And of course I got a smile and an acknowledgment that, yeah, these are interesting times, and I guess this upcoming term or the present term now is an interesting term on sovereign immunity stuff, state's rights and so forth.

So the Supreme Court's obviously very been -- been very -- this Court has in the last few years, and I don't think the wiggle room you're looking for in this context from Seminole and its progeny is there.

MR. LAMONS: May I speak just for the record, Your Honor?

THE COURT: Sure.

MR. LAMONS: Thank you.

THE COURT: Although again I don't want you to repeat what's in your papers.

MR. LAMONS: I understand, Your Honor. Seminole Indian Tribe Florida case, one of the problems that the dissenting opinions raise was the fear that there would be no way to enforce federal bankruptcy laws against state agencies.

The Supreme -- the majority opinion in the Supreme Court stated in footnotes 14 and 16 of the opinion that they did not -- made it very clear, they did not intend to undercut the ex parte Young right of action; that that was a sufficient remedy if state officials were violating federal bankruptcy laws that an ex parte Young proceeding against the individual state official would be the appropriate mechanism to enforce the federal bankruptcy laws in federal court.

In the Board of Appeals Panel decision of In re Lapin versus the Franchise Tax Board, the appellate panel stated specifically that ex parte Young action was available as a

remedy against state tax authorities who were violating the bankruptcy discharge as did the panel in the Morrell decision and the In re Mitchell decision in footnotes.

Also the --

THE COURT: Excuse me. You're right. But you don't have a determination that the debt was discharged.

MR. LAMONS: In those cases --

THE COURT: And you don't have recourse, and that's the argument. It's got to be done in the Bankruptcy Court, and I'm telling you that this Court's reading of 1334(b) belies that.

You have recourse in the state court.

MR. LAMONS: In the -- for example, the Ellett case, one of the issues that was raised in the complaint was a request for declaratory relief that the debt was discharged. That was one of the issues that was going to be litigated under ex parte Young in the Bankruptcy Court.

THE COURT: Well, then how do you get a

determination that the state is not a party?

MR. LAMONS: You get a determination --

THE COURT: You're going to have a declaratory -- think about it. You have a declaratory relief. You're seeking a judgment against the state on an issue of whether or not they

can enforce tax liability.

And you're .using the Young doctrine and saying, well, we're not suing the state, but it doesn't fit.

You are suing the state from this Court's perspective when you're seeking a determination that would provide the basis if this Court had jurisdiction or has jurisdiction to determine whether or not the tax claim is discharged, for a judgment against the state.

Now, if you had that determination -- if you had a determination that this claim or these claims were discharged in bankruptcy and the state were undertaking to enforce collection, Young might very well be applicable -- the Young doctrine -- to enjoin the -- you know, the state official from in

effect violating the discharge injunction.

But as I said in the tentative, (a) I think there's concurrent jurisdiction; not exclusive jurisdiction in the federal court, but concurrent jurisdiction.

I think therefore that the state court does provide a forum for an action to determine the effect of the discharge on these claims.

If you got a determination in the state court that this claim or claims -- these claims were discharged, I'd be very surprised if the State of California would continue its enforcement efforts.

And even then I don't think -- I suppose -- what's it called?

MR. LAMONS: Ex parte Young.

THE COURT: -- ex parte Young would -- well, I don't think that would really come into play, and I guess you'd be dealing with state court and state court orders and determinations and enforcement.

So again if there were a determination in this Court

that they were violating or in violation of it, as you indicated from the footnotes, federal bankruptcy law, that would be one thing.

And if you didn't have recourse to the state court, I might be really troubled by this situation. But the way I read the law, you do have recourse. They're not violating the bankruptcy law, and the place to go with this is across the -- from the civic center.

MR. LAMONS: Your Honor, if I may again. Just -- I want to cite one case that I think is important in this context. Georgia Railroad and Banking Company vs. Red Line. It's a Supreme Court case at 342 U.S. 299, decided 1952.

In that case a taxpayer sued the state alleging that the assessment collection of taxes, was illegal under federal law. And that case was dismissed by the state court saying that there was no state law remedy provided for that argument.

Then the taxpayer appealed, and the Georgia Supreme Court affirmed. Therefore the taxpayer filed a federal action

under ex parte Young to restrain the assessment and collection
of the taxes.

And the federal court assumed jurisdiction under ex parte Young over that case. Of course the first thing the Court had to do was to determine whether or not the assessment collection was illegal under federal law. The Court determined that it was.

And on appeal to the Supreme Court, the -- one of the questions that was raised -- the threshold issue that was raised was whether or not the federal court had jurisdiction in the case because of the eleventh amendment.

Now, that was an action that was brought in federal court against the head of the state tax agency. It was against the state revenue commissioner to -- for -- one, for a determination that this tax is illegal under state law, and, two, for an injunction to prevent the state commissioner or anybody under his authority from collecting the tax or assessing the tax.

THE COURT: It's not illegal under state law; illegal under federal law?

MR. LAMONS: Excuse me, Your Honor?

THE COURT: Not illegal under state law, but illegal under federal law.

MR. LAMONS: It was illegal under federal law. Yeah. Because of the federal constitutional provision regarding interference with contracts.

And they were challenging the legality of a Georgia State statute. And in that case, the Supreme Court held that that was a proper ex parte Young action.

THE COURT: Was not or was?

MR. LAMONS: Was. It was a proper ex parte Young action. Citing again ex parte Young, the -- I could go through a list. I have it here, if you want, Your Honor.

THE COURT: You already did in your papers.

MR. LAMONS: Well, these are cases that I have in response to the reply concerning the official capacity versus not official capacity issue.

I should point out that the very Supreme Court case that's cited, it's a 1983 civil rights action for damages. The very case at footnote 14 says that this official capacity distinction does not apply if the only remedy that's being sought is perspective injunctive relief.

And a subsequent Supreme Court decision has expanded slightly on that and stated quite clearly that the distinction between official capacity and nonofficial capacity actions only is significant under the civil rights laws in the context of actions for damages.

If all you're asking for is perspective injunctive relief under ex parte Young, even if you bring the action against the state officer in his official capacity, the Court has jurisdiction under ex parte Young to determine whether the conduct violates federal law and then if it does to issue a perspective injunction to preclude the state officials from continuing to act.

And every single case that the Supreme Court has reached, the suits have been brought against the head of the

agency, the attorney general, to restrain the people under their control.

THE COURT: The Georgia case that you cited -- excuse me -- it was a case where I think you said there was no recourse under state law. The recourse to the courts of the State of Georgia was denied.

What I'm saying is I think that's a distinction with a meaning in this context. And I think you do have recourse to the courts of the State of California in this context.

Now, if that turns out to be erroneous, I suppose I might rethink the situation. But as far as I know, that's been a procedure available to debtors and prior -- under this prior statute bankrupts for many, many years. And you've had the option.

The state court has the jurisdiction, and the jurisdictional base that we're existing under now, -1-134(b), clearly says there's concurrent jurisdiction over civil actions, and I take this to be a civil action.

MR. SGHERZI: Your Honor, may I address the

Court for just a second on that issue just to alleviate any –

THE COURT: As soon as counsel for the movant or plaintiff finishes.

MR. SGHERZI: Okay.

MR. LAMONS: I'm not aware of any case. Of course I haven't researched this thoroughly, but I am familiar in general with the area in not only preparing for this case but because of my practice.

I'm not aware of a any case where a debtor has brought a state court action to enforce a discharge injunction. And am aware of cases --

THE COURT: Well, to determine discharge -- no. There's a different -- well, I guess you could call it that. But the distinction I'm drawing here is an action to determine or at least a claim for relief for in a state performance of cause of action to determine the effect of the discharge on the particular claim or claims.

That's the tension here, and the concept of retaining the status quo I think can be addressed under state law with

temporary restraining orders and preliminary injunctions and the like, just as it could be here.

MR. LAMONS: And, Your Honor, I anticipate -- and, you know, I am willing to pursue an action in state and see if I can confirm this is true, but I anticipate that in the state court the argument that would be forwarded is that the state court only has jurisdiction in actions against the SBE in this context in a refund action because that's the only type of action that Revenue Taxation Code for the State of California provides, in which event there would be no way.

I understand this question about the Court would have concurrent jurisdiction to determine whether or not the debt was discharged. And perhaps I could bring that up in a refund action by alleging that because this debt was discharged the continuing collection activity -- you know, if they took a dollar in a levy, that that would be more than what was owed because this debt had been discharged.

But the state remedy that's available to taxpayers is a

refund suit, and the state has always argued and always been sustained in arguing that you have to pay the entire principal amount of the assessment before the Court has jurisdiction over the state agency in that context.

THE COURT: In cases where a debtor has gone through bankruptcy and gotten a discharge and contends that the debtor is discharged?

MR. LAMONS: I'm not aware of any litigation in the state court context on that point.

THE COURT: Okay. Thank you.

MR. LAMONS: Thank you.

THE COURT: Movants' counsel.

MR. SGHERZI: Thank you, Your Honor. I'll be brief in my statements.

I think the Court has correctly analyzed the situation.

Probably the large majority of what I do is both tax refund work and bankruptcy work regarding discharge, 505 actions, so on and so forth. So for better or worse, I have a lot of experience in this area particularly with the issue of

sovereign immunity, a lot of appellate work, so on and so forth.

In fact I was trial counsel and appellate counsel on the Lapin case cited by my opponent. And in that case, it is true, there was no question about the fact that unfortunately the tax agency did violate the discharge order.

But even under that circumstance, the Appellate Court held that the proper remedy, even in violation of a Bankruptcy Court order, would be to pursue it in state court and again under 28 U.S.C. 1334(b) using that section's concurrent jurisdiction.

Now, to alleviate any concern that the Court may have or opposing counsel may have, generally speaking in tax matters regarding state tax issues~under CCP Section 8086, the

Superior Court has jurisdiction, and if you boot strap that with the various provisions of the Revenue and Taxation Code, the full amount of tax up to about a few months ago used to be plus

interest, but now that's subject to question -- needed to be paid before they could sue for refund.

I can tell you from experience we have and we continue to receive complaints seeking to determine dischargeability under 28 U.S.C. 1334(b) in state courts. We pursue them the same as we do before the Bankruptcy Court.

You know, again because we need to, and I believe there's a case called Hilton. I don't have the cite, but Hilton basically says under the supremacy clause, the state courts are obligated to act in their capacity of, you know, basically secondary courts for purposes of 1334(b) and to hear these matters.

So it's not a question of whether or not the state court will. I think they're obligated to as a matter of federal law.

And as I say, we have had these come through the office, and we have dealt with them the same way we have before the Bankruptcy Courts.

They're a little bit different. It's kind of unique. This isn't something we've had too much of, but since the

eleventh amendment cases have come in, we're seeing more and more of them.

So if the Court does have any concern about that --

THE COURT: And they -- excuse me -- they existed prior. They existed before the expanded jurisdiction of the Bankruptcy Court.

The concurrent jurisdiction concept actually is not that new. But with the expanded jurisdiction of the -- I'm speaking extemporaneously and more based on having been in this field for, what, 35 years or so now. Is it that long? Maybe not. Yeah. Just about 35. 1 was a lawyer before of course.

The concept of determination of dischargeability is a state court is not an alien concept. It's not a new concept.

I don't think it's been denuded or excluded at all. I think 1334 is clear on that point.

Now, the question of concern that I hear being raised on behalf of the debtor is does the state take the position that you have to pay the tax before you can get a determination of

the dischargeability.

MR. SGHERZI: I can answer that question, Your Honor.

For purposes of determining the dischargeability of a tax, the answer is no because it's based strictly on federal law 1334(b).

THE COURT: That's what I would think.

MR. SGHERZI: And since you wouldn't have to do that in federal court, you necessarily wouldn't have to do that in state court either.

THE COURT: That's what I would think.

Okay. I'll stay with the tentative. The motion is granted, the adversary dismissed.

I don't recall if movant has provided us with the necessary notice of entry forms and mailing envelopes. If you haven't, please do so within seven court days.

MR. SGHERZI: I will, Your Honor. I haven't.

THE COURT: And thank you all.

MR. SGHERZI: Thank you, Your Honor. I

appreciate it.

MR. LAMONS: Thank you, Your Honor.

(Whereupon, the hearing in the above-entitled matter was adjourned.)

--o0o--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

_____ December 20, 1999

Mary C. Clark, Transcriber
AAERT CET**00214

# APPENDIX G

FILED
AUG 23 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| In re: CARMINE ARTIGLIO,<br><br>Debtor.<br><br>– | No. 00-56144<br><br>B.A.P. No. EC-99-01797-KMaJ |
| E. LES SORENSON, Executive Director, California State Board of Equalization,<br><br>Appellant,<br><br>v.<br><br>CARMINE ARTIGLIO,<br><br>Appellee. | ORDER |

BEFORE: O'SCANNLAIN, TASHIMA, and THOMAS, Circuit Judges

The panel has voted unanimously to deny the Appellant's Petition for Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge has requested a vote on whether to rehear the matter en banc. The Petition for Rehearing En Banc is thus DENIED. Fed. R. App. P.35.

# APPENDIX H

## § 106. Waiver of sovereign immunity.

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

## Section 507 (11 U.S.C. § 507)

**§ 507. Priorities.**

(a) The following expenses and claims have priority in the following order:

(2) Second, unsecured claims allowed under section 502(f) of this title.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for -

(A) a tax on or measured by income or gross receipts -

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(E) an excise tax on -

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

## Section 523 (11 U.S.C. § 523)

**§ 523. Exceptions to discharge.**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual

debtor from any debt-

(1) for a tax or a customs duty-

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

## SECTION 524 (11 U.S.C. § 524)

**§ 524. Effect of discharge.**

(a) A discharge in a case under this title-

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under

section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

## SUBCHAPTER III

### The Estate

### SECTION 541 (11 U.S.C. § 541)

**§ 541. Property of the estate.**

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is-

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or

551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date-

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

## SECTION 1306 (11 U.S.C. § 1306)

**§ 1306. Property of the estate.**

(a) Property of the estate includes, in addition to the property specified in section 541 of this title-

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

## SECTION 1328 (11 U.S.C. § 1328)

**§ 1328. Discharge.**

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-

(1) provided for under section 1322(b)(5) of this title;

(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) or 523(a)(9) of this title; or [sic]

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

**(28 U.S.C. § 1334 (b))**

**§ 1334. Bankruptcy cases and proceedings**

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title II.

**(28 U.S.C. § 1341)**

**§ 1341. Taxes by States**

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

**Cal. Const. Art. XIII,**

**§ 32. Process to prevent, or enjoin collection of tax; action to recover tax paid**

Sec. 32. No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

**Cal. Rev. & Tax Code**

**§ 6933. Statute of limitations; jurisdiction; venue; waiver by failure to sue**

Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article I (commencing with Section 6901), the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

**§ 19382. Right of action; void tax**

Except as provided in Section 19385, after payment of the tax and denial by the Franchise Tax Board of a claim for refund, any taxpayer claiming that the tax computed and assessed is void in whole or in part may bring an action, upon the grounds set forth in that claim for refund, against the Franchise Tax Board for the recovery of the whole or any part of the amount paid.

DEC 28 2001

CLERK

No. 01-731

IN THE

# Supreme Court of the United States

GERALD GOLDBERG,

*Petitioner,*

*v.*

JAMES ELLETT, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT JAMES ELLETT

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## REASONS FOR DENYING THE WRIT

### A. THE TAX INJUNCTION ACT

Petitioner erroneously equates a valid bankruptcy discharge of state taxes to a suit challenging the application of state tax laws.

The Tax Injunction Act is directed to suits in which the plaintiff is "challenging the (validity or) application of state tax laws" (Pb 3)[1] and to prevent injunctive or declaratory relief in connection with such a challenge in the federal court where an adequate state remedy is available.

This case does not challenge or dispute any state taxing laws. Respondent

> does not challenge the lawfulness of California's income tax code, nor does he question the State's authority to assess those income taxes in the first instance. Instead, he merely seeks to prohibit Goldberg from violating federal bankruptcy law by collecting the pre-petition taxes at issue as if they were continuing obligations owed to the State notwithstanding the bankruptcy court's discharge order.

(Pb App. 19a.)

The Ninth Circuit's decision, by holding that the Tax Injunction Act does not apply to bankruptcy, properly holds that a bankruptcy discharge is not a challenge to

1. Pb refers to Petitioner's brief

the states taxing laws or tax administration, thus, the Tax Injunction Act does not apply to such a discharge.

Petitioner's position regarding the states' concurrent jurisdiction with the bankruptcy court to decide tax discharge issues adds no support to granting the writ.

Respondent's discharge does not raise any issues of state law that would affect the discharge or any state interest in the discharge. In Respondent's Chapter 13 the state was duly scheduled and noticed and the state failed to file a claim as a result of which the state was not paid and the unpaid taxes were discharged as a matter of law. (Pb App. 2a.) *In re: Tomlin*, 102 BR 290 (ED Wash. 1989), 907 F.2d 114 (9th Cir 1990), *codified by* 11 U.S.C. § 502(b)(9) as to cases filed after October 22, 1994; *New York v. Irving Trust Co.*, 288 U.S. 329 (1933). (Pb App. 10a.)

Additionally, Petitioner's position clearly attempts to eliminate the concept of concurrent jurisdiction and to replace it with exclusive state jurisdiction of bankruptcy discharges of state taxes in cases where there is no state tax law in dispute.

Petitioner's unauthoritative position advocates the expansion of the Tax Injunction Act into the area of bankruptcy discharges where no state taxing law is challenged and to transfer the administration of the uniform federal bankruptcy code to the jurisdiction of the diverse and separate state laws of the several respective states.

The Ninth Circuit's decision is consistent with existing law and does not contravene the Tax Injunction Act or any decision of this Court regarding *Ex Parte Young*. In fact, it is

in strict compliance with the *Ex Parte Young* doctrine. Accordingly there is no compelling reason for the review of the decision of the Ninth Circuit.

## B. *EX PARTE YOUNG*, THE *COEUR d' ALENE* LIMITATION

There is no dispute of the importance of the sovereignty of a states taxing administration as this court has established in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) and *Arkansas v. Farm Credit Service*, 520 U.S. 821, 826 (1997) and that Congress, through the Tax Injunction Act has expressed its assent. (Pb 14.)

However, both *National Private Truck* and *Arkansas* involved direct challenges to the states taxing laws and the Tax Injunction Act duly applies to such challenges, but not to a bankruptcy discharge in which there is no such challenge. Or, there can be no intrusion to state tax administration if there is no challenge to state tax laws and administration.

Assuming that Challenges to state tax collection fit into the same category as the challenge to state title to submerged lands at issue in *Coeur d' Alene* (Pb 14) would be true only if such challenges were in direct dispute with state lax laws or the administration of those laws.

In this case Respondent does not dispute any state tax laws but only seeks to enjoin the continuing violation of the bankruptcy courts discharge order as recognized by the Ninth Circuit at Pb App. 9a.

Petitioner appears to urge at Pb 15 that although the instant case may not have a significant impact on the states

treasury, the cumulative effect of all California bankruptcies would. Thus, a bankruptcy discharge rises to the level of the *Couer d'Alene* limitation which should have been recognized by the Ninth Circuit.

Petitioner fails to recognize that in a bankruptcy discharge there is no affront to the state's tax laws and does not require the state to perform any affirmative act or to amend or modify its taxing laws.

The materially of prospective relief accorded pursuant to *Ex Parte Young* does not invalidate *Ex Parte Young*. "Application of *Ex Parte Young* may have a substantial ancillary effect on a State's treasury." Pb App. 20a citing *Edelman v. Jordan*, 415 U.S. 651, 667 (1974).

The Ninth Circuit's holding that the *Couer d' Alene* limitation does not apply to actions seeking to enjoin state collection of taxes in a bankruptcy proceeding does not conflict with the Tenth circuit in *ANR Pipline, Inc. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998) as set forth at Pb 15.

*ANR* involved a direct frontal attack on the State of Kansas' application of its state taxing laws and sought to force the state of Kansas to extend to *ANR* the same tax treatment that it applied to railroads.

The Ninth Circuit did not rule that the *Coeur d' Alene* special sovereignty interest limitation to *Ex Parte Young* did not apply to state tax collection. (Pb 6.)

The Ninth Circuit considered the relief sought in *Coeur d'Alene*, which produced the limitation, and compared it with the relief sought by Respondent and stated: "We well

recognize the profound nature of this interest, but we believe that Goldberg seeks to frame the issue before us at too broad a level of generality." (Pb App. 19a.)

The Ninth Circuit concluded therefrom "the relief requested by the Tribe in *Coeur d' Alene* would have extinguished the states control over a vast reach of lands and waters, 521 US 282". (Pb 20a.) "In contrast and analogous to the Tribe's action in *Agua Caliente*, Ellett simply seeks prohibitory relief preventing Goldberg from violating the bankruptcy courts discharge injunction by attempting to collect from Ellett specific pre-petition income tax obligations duly discharged in bankruptcy under federal law." (Pb App. 20a.)

Petitioner's position violates the very nature of the *Coeur d'Alene* limitation and advocates such limitation should be generally and blindly applied without evaluation of the specific relief sought. On the other hand the Ninth Circuit has applied the very essence of the *Coeur d'Alene* exception by looking into that which Respondent seeks in comparison to that which the Tribe sought and the degree of intrusion upon the state's sovereignty interest, if any, such relief would have.

Accordingly, the Ninth Circuit has not contravened any provision of the *Coeur d'Alene* limitation and the writ should be denied.

## C. *EX PARTE YOUNG*, THE *SEMINOLE* LIMITATION

*Ex Parte Young* does not interfere with the Tax Injunction Act. The Tax Injunction Act, as historically applied, prohibits the application of *Ex Parte Young* when the relief sought

results in a challenge to the state's taxing laws. The Tax Injunction Act does not apply to bankruptcy discharges where no tax laws are being challenged, thus, there is nothing to interfere with.

Petitioner is misled that *Ex Parte Young* would allow federal courts to enjoin collection of federal taxes. Just the reverse is true. The Tax Injunction Act prohibits the use of *Ex Parte Young* to enjoin the collection of state taxes when such collection arises out of a dispute with the state regarding state tax laws. The Tax Injunction Act prohibits the federal courts from interfering with a state's tax laws in the federal courts. Conversely, the Tax Injunction Act does not permit the state to interfere with the application of federal bankruptcy administration and discharges where no state taxing laws are challenged.

The statutory scheme in *Seminole* was contained in the very federal act that was sued upon and contained substantial limitations that would have been ignored by using *Ex Parte Young*. Also the relief sought in *Seminole* was not prospective in nature and required the state officials to engage in affirmative acts. The Tax Injunction Act is not such a remedial scheme, is not part of the Bankruptcy Code sued upon herein and does not apply to bankruptcy discharges where no state taxing law is challenged.

There is no conflict with the Tenth Circuit in that the *ANR* case did not involve a bankruptcy discharge but was a direct frontal attack on the state of Kansas' tax laws and administration.

Petitioner's position is an attempt to engraft the Tax Injunction Act onto the Bankruptcy Code and thereby destroy

the uniform administration of bankruptcy discharges and place that administration in the hands of the states to be administered by the diverse laws of the several states.

This attempt violates the vast array of legal authority to the contrary in limiting the Tax Injunction Act to those cases where there is a challenge to the states' sovereign taxing laws.

## CONCLUSION

It is clear from the entire record of this case that Petitioner is proceeding upon what he wishes the applicable law to be by citing and applying broad non material generalities to the specific's of this case when in fact those generalities simply do not apply and contradict the well established law applicable to this case. Accordingly the writ should be denied in that no useful purpose would be served by the courts review of the case, except to affirm existing law.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 4 2002
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(3)

No. 01-731

IN THE SUPREME COURT OF THE UNITED STATES

---

GERALD GOLDBERG, Executive Officer of the California Franchise Tax Board, Petitioner,

*v.*

JAMES ELLETT, Respondent.

---

E. LES SORENSON, Executive Director of the California Sate Board of Equalization, Petitioner

*v.*

CARMINE ARTIGLIO, Respondent

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

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**IN THE SUPREME COURT OF THE UNITED STATES**

No. 01-731

---

GERALD GOLDBERG, Executive Officer of the California Franchise Tax Board, Petitioner,

*v.*

JAMES ELLETT, Respondent.

---

E. LES SORENSON, Executive Director of the California State Board of Equalization, Petitioner,

*v.*

CARMINE ARTIGLIO, Respondent.

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

---

Petitioners, Gerald Goldberg, Executive Officer of the California Franchise Tax Board ("FTB") and E. Les Sorenson, Executive Director of the California State Board of Equalization ("SBE") respectfully submit this Reply in support of their Petition for Writ of Certiorari pursuant to Supreme Court Rule 15 (6).

## I. THE OPPOSITION INCORRECTLY CONCLUDES THAT THE TAX INJUNCTION ACT DOES NOT APPLY.

The Tax Injunction Act, 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, (1981) this Court said: "[The Tax Injunction Act], and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." More recently this Court has noted: "The statute, on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting, . . ." (*Arkansas v. Farm Credit Services,* 520 U.S. 821, 823 (1997), and its belief that the Tax Injunction Act requires that federal "courts should adopt a hands-off approach with respect to state tax administration" where there is an adequate remedy at law. *National Private Truck Council v. Oklahoma Tax Comm'n,* 515 U.S. 582, 586 (1995).

Respondent's Opposition Brief ("OB") takes the position that his adversary proceeding in the bankruptcy court does not implicate the Tax Injunction Act. OB at 1. Yet, in support of that contention, he quotes the Ninth Circuit's opinion, which characterizes that adversary proceeding as: "seek[ing] to prohibit [Petitioner] from violating federal bankruptcy law by *collecting the . . . taxes at issue . . . .*." OB at 1, *quoting,* App. 19a (emphasis added). Thus, Respondent's adversary proceeding in bankruptcy court seeks to "enjoin . . . the . . . collection of [a] tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341.

## II. CONCLUSION

For the reasons stated in its Petition and in this Reply, Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted.

Dated: January 31, 2002

Respectfully submitted,

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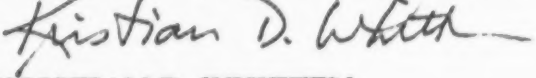

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(4)

No. 01-731

IN THE

# SUPREME COURT OF THE UNITED STATES

GERALD GOLDBERG, EXECUTIVE OFFICER OF THE CALIFORNIA FRANCHISE TAX BOARD,
*Petitioner,*

v.

JAMES ELLETT,
*Respondent.*

E. LES SORENSON, EXECUTIVE DIRECTOR OF THE CALIFORNIA STATE BOARD OF EQUALIZATION,
*Petitioner,*

v.

CARMINE ARTIGLIO,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioners

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No. 01-731

IN THE

# SUPREME COURT OF THE UNITED STATES

GERALD GOLDBERG, EXECUTIVE OFFICER OF THE CALIFORNIA FRANCHISE TAX BOARD,
*Petitioner,*

V.

JAMES ELLETT,
*Respondent.*

E. LES SORENSON, EXECUTIVE DIRECTOR OF THE CALIFORNIA STATE BOARD OF EQUALIZATION,
*Petitioner,*

V.

CARMINE ARTIGLIO,
*Respondent.*

## Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioners

The Multistate Tax Commission ("MTC") submits this brief as *amicus curiae* in support of the Petitioners in accordance with the provisions of Rule 37.6 of the Supreme Court Rules.[1]

[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* MTC and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Consent of all parties to the filing of this brief is filed herewith.

## INTEREST OF AMICUS CURIAE

The MTC is the administrative agency created by the Multistate Tax Compact ("COMPACT"). *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. An additional five States are sovereignty members and sixteen States are associate members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The COMPACT embodies the response of States to efforts in Congress in the mid-1960s to preempt state taxation of interstate commerce. Congress had initiated those efforts because of complexities and inconsistencies of state income tax provisions imposed on multistate businesses. Today's substantial uniformity and simplification in these taxes resulting from the COMPACT and the Uniform Division of Income for Tax Purposes Act, *see* RIA ALL STATES TAX GUIDE ¶ 1361 *et seq.*, (2001), have worked to protect multistate businesses from undue burdens on their interstate commerce and thereby preserve state taxing authority. *See Barclay's Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 312-14 (1994).

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[2] Compact Members: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty Members: Florida, Kentucky, Louisiana, New Jersey and Wyoming. Associate Members: Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Wisconsin, and West Virginia.

The continued existence of the MTC is testament to the vibrancy of Our Federalism and proof that States can, indeed, come together to simplify and enforce in a consistent manner state tax provisions applied to multistate taxpayers. The capability of achieving a functioning nationwide system does not rest exclusively with Congress or federal courts.

The growing predominance of multistate businesses in our nation has resulted in a shift of power from the States to the Federal Government. Ensuring an adequate flow of revenue to the States, however, remains essential to fulfilling their assigned role within our federal union. Thus, a principal mission of the MTC is preserving state taxing authority and plain, speedy and efficient state tax remedies in face of a dominant Federal Government. The member States of the MTC have requested this *amicus* brief to bring to the Court's attention the evident disregard by the Ninth Circuit below of the primacy of state court jurisdiction over state tax matters.

## REASONS FOR ALLOWING THE WRIT

Ellett and Artiglio filed bankruptcies listing state tax debts to which California did not respond. After the bankruptcy courts issued discharges and closed the bankruptcies, the State commenced collection proceedings on post-bankruptcy income. Ellett and Artiglio reopened their bankruptcies seeking to enjoin the tax collector. The Ninth Circuit ruled that the discharges from the initial bankruptcy proceeding were binding on the State and that the Eleventh Amendment was no bar to securing federal court injunctions under *Ex parte Young*, 209 U.S. 123 (1908), to stop the collection efforts of these state tax administrators.

## I

## MANIFEST CONGRESSIONAL INTENT IN THE TAX INJUNCTION ACT TO RESTRICT FEDERAL JURISDICTION OVER STATE TAX MATTERS WHERE STATE PROCEDURES ARE ADEQUATE OVERRIDES THE JUDGE-MADE EXCEPTION TO THE ELEVENTH AMENDMENT IN *EX PARTE YOUNG*.

The decision below improperly denies States the right to use their own plain, speedy and efficient state tax procedures to collect their taxes and protect their taxpayers.

The Ninth Circuit used the "fiction" of *Ex parte Young* to circumvent California's Eleventh Amendment sovereign immunity. It allowed private parties to use federal court to enjoin these state tax administrators from applying their adequate state procedures to determine whether the taxes in question were owed or were discharged in bankruptcy. This use of *Ex parte Young* to permit federal courts to block California's tax collection efforts and bypass California remedial procedures is inconsistent with how Congress and this Court have long viewed federal law and federal court jurisdiction in the context of state taxation.

Taxes are more central to the existence and operation of States than virtually any other power or activity. *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). Both Congress and this Court have embraced this cardinal principle by limiting federal court jurisdiction over state tax matters.

With the Tax Injunction Act, 28 U.S.C. § 1341, Congress expressly carved out an exception to federal court jurisdiction over actions seeking to enjoin the collection of state taxes:

> The district courts shall not enjoin, suspend or restrain the assessmer , levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State

This Court created an analogous exception to federal jurisdiction to sue States over state taxes pursuant to 42 U.S.C. §1983 for "deprivation of any rights, privileges or immunities secured by the Constitution and laws." Not only are plaintiffs barred from proceeding in federal court, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), but even in state court the cause of action against the State will be dismissed if the State provides adequate remedy. *National Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995). The unanimous Court emphasized federal non-interference in this area.

> Since the passage of §1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. * * *
>
> * * * Our cases since *Dows* have uniformly concluded that federal courts cannot enjoin the collection of state taxes when a remedy at law is available. * * *
>
> * * * Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codifica-

> tion of the federal reluctance to interfere with state taxation.

*Id.* at 586, 589, 590.

This hands-off approach expressly sanctions the competence of and preference for state courts to determine whether state tax collection violates federal constitutional or statutory provisions. *See Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof."); *Stone v. Powell*, 428 U.S. 465, 493, n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) ("It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case.").

Application of state taxes to bankruptcy law is no different. State courts are fully competent to adjudicate whether a particular debt is discharged. 28 U.S.C. § 1334(b). The likelihood of divergent, or incorrect, state court decisions is no greater than the likelihood of divergent, or incorrect, lower federal court decisions. Ultimately, this Court resolves conflicts in lower courts on federal issues.

Significantly, this Court recently denied the use of the judge-made fiction of *Ex parte Young* in response to Congress's expressed restrictions on remedy. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44

(1996). A federal action for injunction will not lie where Congress has prescribed the remedial scheme available to challenge a state action in a particular area and that remedial scheme is inconsistent with the breadth of injunctive remedies available under *Ex parte Young*. In *Seminole Tribe* the limitation was expressed through the greatly circumscribed remedies available to Tribes under the Indian Gaming Regulatory Act to challenge States' refusal to bargain in good faith over tribal gambling. Here, the limitation is even more restrictive—the outright ban in the Tax Injunction Act of federal court injunctions against collection of state taxes when adequate state remedies are available.

As the Tenth Circuit put it in *ANR Pipeline v. LaFaver*, 150 F.3d 1178, 1189 (10th Cir. 1998):

> The crucial inquiry is whether Congress has expressed an intent, through some kind of statutory scheme, to limit or prevent potential remedies in a private cause of action even though broader remedies might otherwise be available against the state through the *Ex parte Young* rule. If so, then under *Seminole Tribe*, the federal courts are not ordinarily free to go beyond that congressional intent.

The Ninth Circuit should have respected congressional intent in the Tax Injunction Act and refused *Ex parte Young* jurisdiction. Ellett and Artiglio had adequate remedies under California laws. California's post-bankruptcy collection efforts consisted of attempting to garnish Ellett's wages, Appendix (App.) at 32a, 42a, and offset Artiglio's income tax refund, App. at 59a. Under CAL. CIV. PROC. CODE §

706.076, Ellett could have had a hearing in days to argue to state court that the debt was no longer owed because of payment, satisfaction, or discharge. Artiglio could have used the standard tax refund proceeding under CAL. REV. & TAX. CODE § 6933 to get back his seized income tax refund check if the tax it covered was no longer owed. The condition of an adequate state remedy was met. No federal injunction should have been permitted.

This Court should grant certiorari because of the importance to our federal system of permitting States to control their own tax systems through procedures that adequately protect federal interests. No one questions the supremacy of federal bankruptcy law. The issue here is the jurisdiction of state courts to initially adjudicate the application of that law to state tax collection efforts.

## II

## A BANKRUPTCY COURT DISCHARGE IS NOT BINDING ON A STATE WHEN THE STATE DOES NOT CONSENT TO JURISDICTION.

Eleventh Amendment immunity also underlies the "threshold question" the Ninth Circuit decided below. That question asked "whether a State that does not consent to a bankruptcy court's jurisdiction . . . is nonetheless bound by the bankruptcy court's § 524 discharge injunction." App. 9a. The court held that the bankruptcy court discharge was binding on the State citing *In re Collins*, 173 F.3d 924 (4th Cir. 1999), *cert. denied* 528 U.S. 1073 (2000), and *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). Those de-

cisions do not withstand scrutiny under this Court's Eleventh Amendment jurisprudence.

The Eleventh Amendment bars suits in federal court by private parties against States. This Court has persistently reiterated that rule recently, insulating States from federal actions based on a variety of federal statutes. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (patent law enforcement action); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *Seminole Tribe* (Indian Gaming Regulatory Act).

Suit by a private party debtor under the Bankruptcy Code is no different. A bankruptcy court must have jurisdiction over the State for its discharge order to bind the State. But the Eleventh Amendment precludes that jurisdiction. And Congress cannot abrogate the States' sovereign immunity through its Article I bankruptcy power. *Seminole Tribe*; *In re Murphy*, 271 F.3d 629 (5th Cir. 2001); *In re Mitchell*, 209 F.3d 1111, 1121 (9th Cir. 2000); *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997).

Cases supporting the binding effect of a bankruptcy court discharge order on the federal government are instructive. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 103 (1989); *Neavear v. Schweiker*, 674 F.2d

1201, 1204 (7th Cir. 1982); *Gwilliam v. United States*, 519 F.2d 407, 410 (9th Cir. 1975). Those cases found bankruptcy court jurisdiction to bind the Federal Government to a discharge through a congressional waiver of sovereign immunity within the Bankruptcy Code, 11 U.S.C. § 106(a) (2001) and § 17(c) of the former Bankruptcy Act, 11 U.S.C. § 35 (c) (1976). No such waiver can be legislated against the States' Eleventh Amendment immunity.

Only a State can waive this immunity. When a State appears in a bankruptcy proceeding by filing a proof of claim, it consents to the court's jurisdiction to adjudicate that claim. *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947). But if the State does not voluntarily appear in the bankruptcy action, no waiver of sovereign immunity can be divined. *New York v. Irving Trust Co.*, 288 U.S. 329 (1933), cited by the Ninth Circuit for the contrary position, represents a case in which the State did appear. In *Irving Trust* the issue was timeliness, not jurisdiction. The State claimed that its sovereign immunity allowed it to avoid compliance with the bankruptcy court's bar date when it filed a claim in the bankruptcy action. The Court ruled against the State, holding that if a State chooses to play on the bankruptcy court, it must play by the rules. "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power." *Id.* at 333. The crucial fact was that the State, by filing its claim, voluntarily accepted bankruptcy court jurisdiction over the tax debt.

The Ninth Circuit relied upon *Walker* and *Collins* for the assertion that the bankruptcy court proceedings did not implicate the Eleventh Amendment because they were not "suits" against the State. But

if these bankruptcy proceedings are truly not suits against the State, then there is no basis for the *in personam* jurisdiction over the State that would bind the State to a discharge or injunction. The binding effect of a court order over a litigant is the essence of the power that jurisdiction bestows.

The Eleventh Amendment impediment to jurisdiction over States is analogous to the jurisdictional restrictions imposed by other constitutional provisions. Thus, the absence of notice adequate to satisfy due process deprives the court of jurisdiction to bind a creditor to a discharge. *See Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863) ("Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."); *Ray v. Norseworthy*, 90 U.S. 128, 135-136 (1874) ("the mortgage and privilege of the petitioner could not be cancelled and displaced without notice nor without an opportunity to be heard."); *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902) (notice required but personal service is not). *See also City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 297 (1953); *Bank Of Marin v. England*, 385 U.S. 99, 102 (1966); *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988); *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000); *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 835 (11th Cir. 1989). Statutory provisions in bankruptcy acts have long mandated this due process requirement by conditioning a discharge on notice to creditors. *See, e.g.*, 11 U.S.C. § 523(a)(3). Lack of jurisdiction based on inadequate due process notice, just like lack of jurisdiction because of Eleventh Amendment stric-

tures, limits the power of the bankruptcy court effectively to bind a creditor to a discharge order.

The Fourth, Fifth and Ninth Circuits rested their decisions on the additional theory that *in personam* jurisdiction was unnecessary because the bankruptcy court had jurisdiction over the *res* of the bankruptcy estate, which allowed the court to make its discharge order binding. *Collins*, 173 F.3d at 929; *Walker*, 142 F.3d at 822-23; App. at 12a-13a. Finding jurisdiction over the *res* of the bankruptcy estate may work when the State wants to share in the bankruptcy estate. But it does not work if the State is willing to forgo any part of the estate. The State may choose instead to rest on its Eleventh Amendment sovereign immunity from suit by the debtor, figuring it will take its chances to collect from the debtor later, from subsequently earned income. Once the bankruptcy is completed, the estate distributed, and the case closed, the *res* is over. *See* 11 U.S.C. §§ 541(a) & 1306(a). Subsequent income never was, nor could have been, part of the bankruptcy estate because it came into existence after the closing of the bankruptcy action.

In denying rehearing, the Ninth Circuit stated: "Goldberg would interpret *Irving Trust* to permit a State to bypass federal bankruptcy proceedings altogether and yet still 'participate in the assets of the bankrupt.'" App. at 11a. This is incorrect. California was not seeking to participate in a bankrupt's estate when it levied on Ellett's post-bankruptcy wages or Artiglio's post-bankruptcy income tax refund. Bankruptcy court jurisdiction premised on jurisdiction over the *res* cannot reasonably bind the State to bar California's post-bankruptcy levies.

> If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

*Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

Indeed, there is good authority that even *in rem* jurisdiction will not avoid the States' Eleventh Amendment sovereign immunity. *See Nordic Villages*, 503 U.S. at 38 ("Equally unpersuasive is respondent's related argument that a bankruptcy court's in rem jurisdiction overrides sovereign immunity."); *Missouri v. Fiske*, 290 U.S. 18, 28, (1933) ("The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a nonconsenting state.").

The Ninth Circuit decision fundamentally rejects this Court's Eleventh Amendment jurisprudence by interpreting the Bankruptcy Code to authorize private parties to sue in federal court to eliminate their state tax debts despite state Eleventh Amendment sovereign immunity. To be sure it is a good idea to give debtors a fresh start. But Congress also deems it a good idea to bar discrimination against the disabled, *Board of Trustees v. Garrett*, and the elderly, *Kimel*, to protect patent holders, *Florida Prepaid*, and trademark holders, *College Savings Bank*, against infringement and to protect workers against abuse of federal wage and hour rules, *Alden v. Maine*, 527 U.S. 706 (1999). Nonetheless, this Court has repeatedly reaffirmed in these cases that Con-

gress cannot authorize private parties to obtain Article I federal statutory relief against non-consenting States asserting their Eleventh Amendment sovereign immunity—the Supremacy Clause notwithstanding.

In both the discharge order and injunction proceeding, the Ninth Circuit ruled on the power of federal *court* to bind the State. We argue here that the Eleventh Amendment denies the debtor federal court jurisdiction over an unconsenting State to discharge a state tax or to enjoin state tax collection. This jurisdiction of the federal court over States and state officers, however, must be distinguished from the power of Congress to enact substantive laws binding on States in state courts under the Supremacy Clause. A discharge mandated by federal law, not by a federal court, might be an entirely different kettle of fish. *See In re NVR Homes, LP,* 189 F.3d 442, 453 (4th Cir. 1999) ("Although federal law may reign supreme in the bankruptcy context, the federal courts do not necessarily reign supreme over an unconsenting state's treasury."(emphasis original)); *See also* Karen Cordry, "Casey Comes To Bat Again? In Re Ellett, 254 F.3d 1135 (9th Cir. 2001)", Norton Bkrptcy Law Advisor, November 2001.

What constitutes a "suit" against the state for purposes of the Eleventh Amendment is already before the Court this term in *Federal Maritime Commission v. South Carolina State Ports Authority,* Sup. Ct. No. 01-46. The Court's decision there inevitably will inform whether these bankruptcy proceedings are suits. By granting certiorari here, these litigants will gain the benefit of the Court's current wisdom.

## III
## THIS CASE MERITS REVIEW.

The Court is besieged with petitions for certiorari. Some seek review of decisions that were clearly erroneous and surely a great injustice. Others seek clarification of the law for the better functioning of society and for the benefit of their own cause. Of course, both obtain here.

But more important, petitioners here are long-time public servants burdened with perhaps the most thankless—but most necessary—of public jobs, that of tax collector. The uncertainty of the law here exposes them to the additional burden of being in harms way for personal liability. As Justice O'Connor noted in her concurring opinion in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 288:

> The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.

These worthy tax collectors who administer fair, speedy and efficient state tax procedures should not be left with the sword of personal liability hanging over their heads.

## CONCLUSION

For the reasons stated above, *Amicus Curiae* Multistate Tax Commission respectfully urges the Court to grant the Petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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